1824.

Osborn v. U. S. Bank.

ring, and no balances are otherwise adjusted than for the mere purpose of making rests, we are of opinion, that payments ought to be applied to extinguish the debts according to the priority of time: so that the credits are to be deemed payments *pro tanto* of the debts antecedently due.

Upon the whole, it is the opinion of the Court, that for the error of the District Court, on the question of laches, the judgment ought to be reversed, and a *venire facias de novo* awarded, with directions, also, to allow the parties liberty to amend their pleadings.

[Constitutional Law. Chancery.]

Osborn and others, *Appellants*,

v.

The President, Directors, and Company of the Bank of the United States, *Respondents*.

The act of incorporation of the Bank of the United States gives the Circuit Courts of the United States jurisdiction of suits by and against the Bank.

This provision in the charter is warranted by the 3d article of the Constitution, which declares, that "the judicial power shall extend to *all cases*, in law and equity, arising under this Constitution, *the laws of the United States*, and treaties made, or which shall be made, under their authority."

It is unnecessary for an attorney or solicitor, who prosecutes a suit for the Bank of the United States, or other corporation, to produce a warrant of attorney under the corporate seal.

Whatever authority may be necessary for an attorney or solicitor to appear for a natural or artificial person, it is not a ground of re-

versal for error, in an appellate Court, that such authority does not appear on the face of the record. It is a formal defect, which is cured by the statute of jeofails, and the 32d section of the Judiciary Act of 1789, ch. 20.

In general, the answer of one defendant in equity cannot be read in evidence against another. But where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule does not apply.

Where the defendant is restrained by an injunction, from using money in his possession, interest will not be decreed against him.

An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges.

In general, an injunction will not be allowed, nor a decree rendered, against an agent, where the principal is not made a party to the suit. But if the principal be not himself subject to the jurisdiction of the Court, (as in the case of a sovereign State,) the rule may be dispensed with.

A Court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks.

The Circuit Courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the Bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of a State; and, as the State itself cannot, according to the 11th amendment of the Constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the State, who are intrusted with the execution of such laws.

A State cannot tax the Bank of the United States; and any attempt, on the part of its agents and officers, to enforce the collection of such tax against the property of the Bank, may be restrained by injunction from the Circuit Court.

APPEAL from the Circuit Court of Ohio.

The bill filed in this cause, was exhibited in the Court below, at September term, 1819, in the name of the respondents, and signed by solicitors of the Court, praying an injunction to restrain Ralph Osborn, Auditor of the State of Ohio,

1824. Osborn v. U. S. Bank.

from proceeding against the complainants, under an act of the Legislature of that State, passed February the 8th, 1819, entitled, "An act to levy and collect a tax from all banks, and individuals, and companies, and associations of individuals, that may transact banking business in this State, without being allowed to do so by the laws thereof." This act, after reciting that the Bank of the United States pursued its operations contrary to a law of the State, enacted, that if, after the 1st day of the following September, the said Bank, or any other, should continue to transact business in the State, it should be liable to an annual tax of 50,000 dollars on each office of discount and deposit. And that on the 15th day of September, the Auditor should charge such tax to the Bank, and should make out his warrant, under his seal of office, directed to any person, commanding him to collect the said tax, who should enter the banking house, and demand the same, and if payment should not be made, should levy the amount on the money or other goods of the Bank, the money to be retained, and the goods to be sold, as if taken on a *fi. fa.* If no effects should be found in the banking room, the person having the warrant was authorized to go into every room, vault, &c. and to open every chest, &c. in search of what might satisfy his warrant.

The bill, after reciting this act, stated, that Ralph Osborn is the Auditor, and gives out, &c. that he will execute the said act. It was exhibited in open Court, on the 14th of September, and, notice of the application having been given to the defen-

dant, Osborn, an order was made, awarding the injunction on the execution of bonds and security in the sum of 100,000 dollars; after which, a subpœna was issued, on which the order that had been made for the injunction was endorsed by the solicitors for the plaintiffs; and a memorandum, that bond with security had been given by the plaintiffs, was endorsed by the clerk; and a power to James M'Dowell to serve the same, was endorsed by the Marshal. It appeared, from the affidavit of M'Dowell, that both the subpœna and endorsement were served on R. Osborn, early in the morning of the 15th. On the 18th of the same month of September, a writ of injunction was issued on the same bill, which was served on R. Osborn and on John L. Harper. The affidavit of M'Dowell stated, that he served the writ on Harper, while on his way to Columbus, with the money and funds on which the same were to operate, as he understood; and that the writ was served on Osborn, before Harper reached Columbus.

In September, 1820, leave was given to file a supplemental and amended bill, and to make new parties.

The amended bill charges, that, subsequent to the service of the subpœna and injunction, to wit, on the 17th of September, 1819, J. L. Harper, who was employed by Osborn to collect the tax, and well knew that an injunction had been allowed, proceeded by violence to the office of the Bank at Chilicothe, and took therefrom 100,000 dollars, in specie and bank notes, belonging to, or in deposit with, the plaintiffs. That this money

1824.

Osborn v. U. S. Bank

was delivered to H. M. Curry, who was then Treasurer of the State, or to the defendant, Osborn, both of whom had notice of the illegal seizure, and paid no consideration for the amount, but received it to keep it on safe deposit. That Curry did keep the same until he delivered it over to one S. Sullivan, his successor as Treasurer. That neither Curry nor Sullivan held the said money in their character as Treasurer, but as individuals. The bill prays, that the said H. M. Curry, late Treasurer, S. Sullivan, the present Treasurer, and R. Osborn, in their official and private characters, and the said J. L. Harper, may be made defendants; that they may make discovery, and may be enjoined from using or paying away the coin or notes taken from the Bank, may be decreed to restore the same, and may be enjoined from proceeding further under the said act.

The defendant, Curry, filed his answer, admitting that the defendant, Harper, delivered to him, about the 20th of September, 1819, the sum of 98,000 dollars, which, he was informed and believed, was a tax levied of the Branch Bank of the United States. He passed this sum to the credit of the State, as revenue; but, in fact, kept it separate from other moneys, until January or February, 1820, when the moneys in the treasury were seized upon by a committee of the House of Representatives; soon after which he resigned his office, and the moneys and bank notes, in the bill mentioned, still separate from other moneys in the treasury, came to the hands of S. Sullivan, the

present Treasurer, who gave a receipt for the same.

The defendant, Sullivan, failing to answer, an attachment for contempt was issued, on which he was taken into custody. He then filed his answer, and was discharged.

This answer denies all personal knowledge of the levying, collecting, and paying over, the money in the bill mentioned. It admits that he was appointed Treasurer, as successor to Curry, on the 17th of February, 1820, and that he entered the Treasury on the 23d, and began an examination of the funds, among which he found the sum of 98,000 dollars, which he understood was the same that is charged in the bill; but this was not a fact within his own knowledge. He gave a receipt as Treasurer, and the money has remained in his hands, as Treasurer, and not otherwise. The sum of 98,000 dollars remains untouched, out of respect to an injunction said to have been allowed by the Circuit Court, on a bill since dismissed. He admits the sum in his hands to correspond with the description in the bill, so far as that description goes, and annexes to his answer a description of the residue. He has no private individual interest in the money, and holds it only as State Treasurer; admits notice, from general report, and from the late Treasurer, that the said sum of 98,000 dollars was levied as a tax from the Bank, and that the Bank alleged it to be illegal and void.

The cause came on to be heard upon these answers, and upon the decrees *nisi*, against Osborn and Harper, and the Court pronounced a decree

1824.
Osborn v. U.S. Bank.

directing them to restore to the Bank the sum of 100,000 dollars, with interest on 19,830 dollars, the amount of specie in the hands of Sullivan. The cause was then brought, by appeal, to this Court.

Mr. *Hammond*, for the appellants, contended, that the decree was erroneous, for the following reasons:

1. Because, no authority is shown in the records, from the Bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because, the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because, the case made in the bill does not warrant the interference of a Court of Chancery by injunction or otherwise.

6. Because, if any case is made in the bill, proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because, the decree assumes, that the Bank of the United States is not subject to the taxing

power of the State of Ohio; and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

1824.

Osborn v. U. S. Bank.

1. A sufficient authority must be shown for the institution of every legal proceeding. This principle is peculiarly applicable to suits brought in the name of corporations; because, such a body must always appear by attorney, either to institute or defend a legal proceeding. It cannot appear in person, and it can only constitute an attorney by written power, under its common seal. This doctrine is not impugned by the decision of this Court in the case of the *Bank of Columbia v. Patterson*.[a] The old doctrine, that a corporation could not contract or promise, except by writing, under its common seal, is overruled in that case; and it was adjudged, that a contract made by a committee duly authorized for that purpose, binds the Corporation. It seems, also, to be intimated, that a Corporation may, by resolution, or other act, not under their common seal, duly appoint and authorize an agent, whose contracts would bind them; and the case of *Rex v. Bigg*,[b] is referred to as authority. But, upon looking into that case, it will be found, that the principle is merely laid down by counsel *arguendo;* and the counsel, by whom it is advanced, add, "But in case of any thing of consequence, or the employing any one to act in their behalf, in a matter which is not an ordinary service, a corporation

a 7 *Cranch*, 299.
b 3 *P. Wms.* 419.

1824. Osborn v. U. S. Bank.

aggregate cannot do that without deed." Now, what can be of more consequence, than such a suit as this, commenced, in effect, against a sovereign State, by this corporation? In *Fleckner v. the Bank of the United States*,[a] the Court has gone no farther, than to determine that the board of Directors may, by resolution, authorize their Cashier to transfer bills or notes, the property of the Bank, and need not make a power under seal for that purpose. This is a very different matter from authority to prosecute such a suit as the present. It falls within the scope of the ordinary official duties of the Cashier. But even admitting that any express authority from the Bank, whether under the common seal or not, would have been sufficient in the present case, it is indispensable that such authority should be produced and filed. This has not been done, and therefore it must be concluded, that the suit is wholly unauthorized by the corporation, in whose name it has been commenced.

2. The answer of the defendant, Sullivan, contains no admission that the notes and coin were the property of the plaintiff, or that the injunction was violated in taking them from their possession. In *Hills v. Binney*,[b] the bill was filed by a creditor against an administrator, who, by his answer, stated, that he *believed* the debt was due. Mr. Fonblanque, for the plaintiff, expressed a doubt whether there was a sufficient foundation for a

a 8 *Wheat. Rep.* 338.
b 6 *Ves. jun.* 738.

decree. Lord Eldon inclined to think it sufficient; but Mr. Richards, as *amicus curiæ*, suggesting that it was doubtful, Mr. Fonblanque consented to exhibit an interrogatory. The admission there was much stronger than any in the answer of the defendant, Sullivan. He has no where said, that he believes the notes and coin to be the property of the plaintiffs; on the contrary, he avers that, personally, he knew nothing about the collection of the tax, except from general report, and the information of the late Treasurer. No proof whatever, of general report, or of the declarations of the late Treasurer, would be sufficient to establish any fact. Sullivan's admission of this general report, and of this information, gives it no higher character than it would be entitled to upon being proved. The admission does not support the decree, and there is no other proof in the case.

3. The decree against the defendants, Osborn and Harper, so far as it requires them to pay the amount of the coin and notes specified in the bill, to the plaintiffs, is erroneous, because the bill shows that the same were not in the possession of those defendants. The foundation upon which a Court of equity proceeds, is to redress the party under its protection, not to punish the wrongdoers. When punishment is the object, process for contempt is resorted to. Equity will look at the situation of all the parties, and will distinguish among the defendants, who can, and who cannot, comply with such decree, as, upon equitable principles, must be pronounced. A plaintiff in equity cannot

1824.

Osborn v. U. S. Bank.

fasten upon the specific subject for which he sues, and obtain an order retaining it in the hands of one defendant, subject to a final decree, and obtain a decree for restitution against other defendants, who, by his own showing, have not the subject in their power. Admitting that it was necessary to make all concerned in the transaction defendants, in order to ascertain who had possession of the subject, yet when that fact was ascertained, no decree (except as to costs) could be pronounced against those who were not in possession of it, and who claimed no interest in it. Where a party acts under an authority which he supposes valid, but which the Court adjudge to be void, he is not to be regarded as a principal wrongdoer, further than the purposes necessarily require. In a Court of equity, he is equitably, not vindictively, responsible.

4. Under the circumstances of the case, the defendants ought not to be chargeable with interest upon the coin in question. It may be admitted, that, in general, where a defendant has wrongfully possessed himself of the plaintiff's money, and thus deprived him of the use of it, equity may compel him to account for interest. But here, the injunction forbidding the use of the coin was obtained at the plaintiff's request. Its effect and operation were, to place it in the custody of the law. The defendants could not use it, and, consequently, cannot be charged with interest.

5. No case is made out in the original bill, warranting the interposition of a Court of equity by injunction. The injunction, if sustained at all,

must be upon one of two principles; either that it was necessary to secure to the Bank the enjoyment of a franchise or exclusive privilege, or to protect it from an irreparable mischief.

All the cases where injunctions have been granted, to protect parties in the enjoyment of a franchise, proceed upon the principle, that the injury was consequential, not direct, and that it would be difficult, if not impossible, to estimate the damages. Thus, the proprietor of a machine, for which a patent has been granted, or of a book for which a copy-right has been obtained, may have an injunction to prevent others from using the machine, or vending the book. So, also, the proprietor of a toll-bridge or a turnpike road, may have an injunction to prevent others from constructing and using a bridge or road, where it would be contrary to the terms of the plaintiff's grant. But in all these cases, the injunction is granted upon the principle, that the act complained of is not only unlawful, and, therefore, unjustifiable, but that it is, in addition to its illegality, of a character for which compensation cannot be made in damages. But no case can be found of an injunction granted to protect the proprietor, in the instances mentioned, against the commission of a mere trespass, where the party could have redress in damages, and where the trespass would not interfere with the franchise, further than every wrong interferes with the right of the individual upon whom it is inflicted. Wherever an injunction is granted for the protection of a franchise, the case must show that the party has the sole and exclu-

1824.

Osborn v. U. S. Bank.

sive right to do the act, or transact the business, which he seeks to inhibit the defendant from performing. Thus, an injunction has been allowed to the *East India Company*, to prevent an interference witht he trade exclusively secured to them by their charter.[a] But, would an injunction be granted against seizing, by violence, the goods they may import, or doing injury to their ships when in port? So, a person entitled to an exclusive right of ferry, has been allowed an injunction to prevent ferrying by others.[b] But it does not follow that an injunction would be allowed, to prevent an injury which the proprietor might apprehend to his boats, or their tackle, or to the landing place. Here the original bill does not present a case for an injunction to secure the enjoyment of a franchise upon these principles. It seeks to be protected against an injury amounting to a trespass, and nothing more. The bill claims, that it is one of the corporate franchises of the Bank, to establish offices of discount and deposit, and transact banking business, any where, according to the discretion of the directors. But it is only when the franchise confers a sole and exclusive right, that the jurisdiction of a Court of equity attaches, and it then attaches only so as to prevent others from invading that right, by attempting an actual participation in its use and enjoyment. It cannot be pretended, that the charter of the Bank confers upon it any exclusive right to carry on the

a 1 *Ves.* 127.
b 1 *Ves.* 476.

trade of banking. It cannot, therefore, come into a Court of Chancery to seek protection against any person for violating an exclusive franchise. If it be said, that the privilege of exemption from State taxation is one of this nature, the answer is, that this privilege operates, not against individuals, but against the power authorized to lay and collect taxes. It does not operate against any individual, who is invested with no power of taxation, but who commits a trespass under colour of levying a tax.

Nor can the injunction be supported, upon the ground that the case presented required this extraordinary interference of the Court, to protect the Bank against irreparable mischief. It is but recently that injunctions have been issued to restrain the commission of an act amounting to trespass only. Lord Hardwicke says, "every common trespass is not a foundation for an injunction in this Court."[a] Lord Kenyon, M. R., asserts, that "a Court of Chancery will not interfere, when the matter is merely in damages."[b] And Lord Eldon says, "I remember when, in a case of trespass, unless it grew into a nuisance, an injunction would have been refused."[c] The first reported case of an injunction in trespass, is that of *Mitchel v. Dorrs*, where the defendant had begun to dig coal in his own ground, and worked into that of the plaintiff. Lord Eldon said, "That is trespass, not waste. But I will grant the injunction

a 3 *Atk.* 21.
b 2 *Bro. C. C.* 65.
c 7 *Ves. jr.* 307.

1824.

Osborn v. U. S. Bank.

upon the authority of a case before Lord Thurlow."[a] This last case was where the landlord owned two adjacent closes, and demised one. The tenant commenced mining for coal in the demised close, and continued to mine until he entered the close not demised. Lord Thurlow, after great hesitation, granted the injunction, upon the ground, as Lord Eldon himself asserts, of the irreparable ruin of the property as a mine, and it being a species of trade; and upon the principle of the Court enjoining in matters of trespass, where irreparable damage is the consequence.[b] The next case was that of *Hanson v. Gardiner*,[c] where an injunction was granted upon the application of a person claiming in different rights, one of which was as lord of the manor, under the statute of Merton, against trespass by the commoners, and, upon hearing, the injunction was dissolved. An application was afterwards made by the devisees of an equity of redemption, in receipt of the rents, for an injunction against the mortgagee, claiming, as heir, to restrain him from cutting timber; but it was refused.[d] An injunction was subsequently granted, at the application of the landlord, to restrain a person charged to be in collusion with the tenant, from cutting or removing timber, or committing any other waste. Lord Eldon puts this upon the ground, that it partakes more of

a 6 *Ves. jr.* 147.
b 7 *Ves. jr.* 307
c 7 *Ves. jr.* 305.
d Smith v. Collyer, 8 *Ves.* 89.

waste than in general cases, and says, he will not be bound as to what is to be done upon a mere trespass; though, he adds, that it is strange if there cannot be an injunction in that case, to prevent irreparable mischief. The next case of an injunction in trespass, is *Crockford v. Alexander*.[a] The plaintiff contracted to sell an estate to the defendant, who got possession from the tenant, and began to cut timber. The injunction was allowed; but the Lord Chancellor says, "I will grant this protection against cutting timber, until the power of the Court to grant the injunction against trespass shall be fully discussed." It is singular, that in this case Lord Eldon should again state the case decided by Lord Thurlow, respecting the mines; and add, that Lord Thurlow considered it trespass, not waste, and refused the injunction. The injunction is justified by analogy; and reference is made to *Robinson v. Byron*,[b] which, upon examination, will be found not to be a case of trespass, but one where the defendant, having a command of the water, was about so to use it, within his own premises, as to throw it out and deluge the plaintiff: it was destruction. In *Thomas v. Oakley*,[c] the plaintiff was seised in fee of an estate, in which there was a stone quarry, and the defendant held a contiguous estate, with a right to enter the quarry and take stone for a special purpose, but was taking it for other purposes.

a 15 *Ves.* 137.

b 1 *Bro. C. C.* 588.

c 18 *Ves.* 185. See also Kinder v. Jones, 17 *Ves.* 110. and Earl Cowper v. Baker, *Id.* 127.

1824. Osborn v. U. S. Bank.

The counsel insisted that it was the course of modern authority, to afford assistance in cases of coal mines, timber, &c. to prevent irremediable mischief and injury, which damages could not compensate. Lord Eldon held, that upon the decisions which had taken place, the bill must be sustained. He refers to the first case decided by Lord Thurlow, and his hesitation, and adds, "But I take it that Lord Thurlow changed his opinion upon that; holding, that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which, in equity, he was entitled. The interference of the Court is to prevent your removing that which is his estate. If this protection would be granted in the case of timber, coals, and lead ore, why is it not equally to be applied to a quarry?"

There is no analogy between these cases and the present. No estate of a stable and permanent character is to be injured. The naked suggestion in the bill is, that the plaintiffs verily believe that the defendant threatens to do an act amounting to a mere trespass. Lord Eldon says, "I never would grant an injunction, upon an affidavit stating that the deponent verily believes the defendant is about to cut timber."[a] Some act must be done, moving towards the commission of wrong; such as sending a surveyor to mark trees.[b] None of the cases stand upon a mere *quia timet*. But

a Etches v. Lance, 7 *Ves.* 417.
b Jackson v. Cator, 5 *Ves.* 690.

here, not even a belief that the defendant meant to commit the trespass is asserted. Regard the case as against Osborn only and individually; separate him from the State tax, and from his office as Auditor; and whether the bill is brought to protect a franchise or prevent a trespass, it cannot be maintained.

6. But, in fact, the bill is against the State, and as such, the Circuit Court has no jurisdiction of it. In this bill, all the component parts of a case against the State, are set out in their regular and proper order: the privilege; the measures set on foot to invade it; their unjust and oppressive character, and the prayer for relief against them. There is no allegation against any individual; no relief is prayed against any person in his private and individual character. The acts complained of, are the acts of the Legislature; the party charged with aggression on the plaintiff's right, is the Legislature; the relief prayed, is against the acts of the Legislature; the State is the sole party in interest. It is true, process is not prayed or awarded against the State; but the bill is substantially the same as it would have been, had the plaintiffs intended to make the State a formal party by process. In all ordinary cases, if the Court sees from the face of the bill, that the actual and principal party in interest is not before them, it will either dismiss the bill, or stay the proceedings until proper parties are made. A decree, vitally affecting the interests of a principal, will never be pronounced, where his agent is the only party to the bill. In *Vernon v. Blacker-*

1824. Osborn v. U. S. Bank.

ly,[a] the suit was brought against the defendant, treasurer of the commissioners for building fifty new churches, to compel the payment of moneys claimed to be due from the commissioners. Lord Hardwicke dismissed the bill, saying, "it would be absurd that a bill should lie against a person who is only an officer, and subordinate to others, and has no discretionary power. It is absurd to make a party who acts ministerially, the sole party."

If, then, the State be the only party interested, and if the bill, in its terms, and in its effect, operates solely upon the State, the State ought to be made a party. If the Circuit Court cannot exercise jurisdiction where the State is a party direct, it ought not, it cannot, be permitted to obtain that jurisdiction, by an indirect mode of proceeding. This would be to disregard the substance of things, and found a jurisdiction upon arbitrary definition.

We maintain, that the State of Ohio is, in fact, the sole defendant in this cause; and that the jurisdiction of the Circuit Court is excluded, (1.) By the constitution of the United States; (2.) By the judiciary act.

We contend, further, that if the subject matter in controversy between the actual parties to this cause, presents a case within the jurisdiction of the federal judiciary, that jurisdiction is vested exclusively in the Supreme Court, both by the constitution and by the judiciary act.

The constitution, after defining the cases in which the federal judiciary shall take cognizance,

a 2 *Atk.* 144.

declares, that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction." 1824. Osborn v. U. S. Bank.

According to the interpretation given to the constitution by this Court, in *Cohens v. Virginia*,[a] a State may be made a party, before the federal Courts, wherever the case arises under the constitution, or a law of the United States; or where the controversy is between two States, or one State and a foreign State.

In this case, the controversy arises under the constitution of the United States, or under the act of incorporation, or under both. It is a case of original jurisdiction; and by the express letter of the constitution, the Supreme Court alone are authorized to take jurisdiction.

In *Marbury v. Madison*,[b] this Court decided, that it was not competent for Congress to invest the Supreme Court with original jurisdiction, in any other cases than those described in the constitution. It is supposed, that the principle of this decision, and the reasoning of the Court in support of it, both conduce to the conclusion, that where original jurisdiction is given by the constitution to the Supreme Court, Congress cannot distribute any part of such original jurisdiction to an inferior federal tribunal. It would hardly seem rational to decide, that the framers of the constitution inserted this clause for no other purpose but that of

a 6 *Wheat. Rep.* 378.
b 1 *Cranch*, 174.

1824.
Osborn v. U. S. Bank.

limiting the power of Congress, as to the cases in which they should give the Supreme Court original jurisdiction. There could have been no just ground for apprehending, that the National Legislature would impose original jurisdiction upon the Supreme Court to a mischievous extent. Considering the character of the parties, between whom the constitution invests the Supreme Court with this jurisdiction, it is a much more rational inference, that it was intended to prevent Congress from subjecting them to the power of any inferior tribunal. "If the solicitude of the Convention, respecting our peace with foreign powers, induced a provision, that the Supreme Court should take original jurisdiction, in cases which might be supposed to affect them," the same solicitude would seem to require an interpretation, by which the original jurisdiction of other Courts should be excluded. If Congress be at liberty to give original jurisdiction to inferior Courts, where the constitution has given it to the Supreme Court, it will be the easiest thing in nature to defeat that object, which the solicitude of the Convention intended to secure. If these terms do not operate exclusively upon Congress, they cannot operate exclusively upon the States; so that the exemption of foreign ministers from liability in State tribunals, is not secured by the constitution, but depends upon an act of Congress, and may be put an end to whenever the National Legislature choose.

In the case of *Cohens v. Virginia*, it is said, that "when the constitution declares the jurisdiction, in cases where a State shall be a party, to be

original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible, that its framers designed to include in the first class, those cases in which jurisdiction is given, because a State is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution, or a law.[a]"

It is allowed, that "it may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there;"[b] though it be immediately afterwards asked, "can it be affirmed that a State might not sue a citizen of another State in the Circuit Court?"[c] From the whole, this final conclusion is deduced: "The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised, in consequence of the character of the party; *and an original suit might be instituted in any of the Federal Courts,* not to those cases in which an original suit might not be instituted in a Federal Court."

The result of this reasoning seems to be, that where the jurisdiction of the Federal Court attaches, in consequence of the character of the party, in that case, no original suit can be brought against a State, except in the Supreme Court. But if a

a 6 *Wheat. Rep.* 393.
b *Id.* 395.
c *Id.* 396.

1824.
Osborn v. U. S. Bank.

State become liable to an action, in a case arising under the constitution, or a law of the United States, then any of the Federal Courts may entertain jurisdiction.

We cannot think, that the Court meant to assert this position; or that if they did, they will adhere to it. No good reason can be perceived, for sustaining a distinction of this kind. The policy which exempts the States from the jurisdiction of inferior Courts, is the same in both cases; and the terms of the constitution comprehend the one class of cases as well as the other. The words, "*all cases*," embrace as fully a case against a State, arising under the constitution, or a law, as they do a case between two States, or between a State and a foreign State. The same terms are used in defining the extent of the judicial power in the first class of cases described, and the Court thus speak of their effect: "This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard o the condition of the party. If there be any exception, it is to be implied against the express words of the article." The same may be said, with equal force, of the terms, when employed to define the original jurisdiction of the Supreme Court. The true reading and understanding are, "*in all cases* affecting ambassadors, other public ministers, and consuls, and *in all* those in which a State shall be a party, the Supreme Court shall have original jurisdiction." If there be any exception, by which a State can be sued in an original suit before an inferior federal tribunal, such

exception must be implied against the express words of the article, and can only be sustained "upon the spirit and true meaning of the constitution; which spirit and true meaning must be so apparent, as to overrule the words which its framers have employed."

There is no difficulty in giving full force and effect to the constitutional distribution of jurisdiction, as we interpret it, without touching the appellate jurisdiction asserted in the case of *Cohens v. Virginia*. By that case, it is settled, that the judicial power of the United States extends to a class of cases which cannot originate in any federal tribunal, and that this jurisdiction must, of necessity, be appellate. The distribution of jurisdiction must be interpreted as if the judicial power was extended, by the letter of the constitution, to this class of cases, in express terms. The first member of the sentence must be understood as applicable only to cases in which original jurisdiction is vested in the federal judiciary. The second, to every description of appellate jurisdiction, whether it arise under the constitution, or be created by law. Thus, if a case arise under the constitution, or a law of the Union, in which an original suit may be sued against a State, the constitution requires such suit to be brought in the Supreme Court. If a State be plaintiff or defendant in a State Court, and a question arise under the constitution, or a law of the Union, and a case be made at the trial, upon which the federal judicial power attaches, the constitution authorizes the Supreme Court to exercise appellate jurisdiction.

1824
Osborn v. U. S. Bank.

There is no occasion to confound the two classes of cases, or to bring the two kinds of jurisdiction into collision. The appellate jurisdiction of the Supreme Court may, consistently, be extended to the proper class of cases where a State is a party, without so interpreting the constitution, as to subject the States to original actions in the inferior national tribunals.

But whatever may be the correct interpretation of the constitution upon this point, it has long been settled, that the Circuit Courts can exercise no jurisdiction but what is conferred upon them by law. The judiciary act does not vest them with jurisdiction where a State is a party. On the contrary, in a case like the present, it vests exclusive jurisdiction in the Supreme Court.

The judiciary act of 1789, c. 20. sec. 13., provides, that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, and except also between a State and citizens of other States, or aliens; in which latter case, it shall have original, but not exclusive jurisdiction." This act, which distributes and defines the jurisdiction of the different federal Courts, does not, in terms, vest the Circuit Court with jurisdiction in any case arising under the constitution or the laws of the United States. And in *M'Intire v. Wood*,[a] this Court decided, that this portion of federal jurisdiction could not be exercised by the Circuit Courts, unless expressly confer-

[a] 7 *Cranch*, 505.

red by law. Neither does this act give jurisdiction to the Circuit Court, in any case where a State is a party; but, on the contrary, all original jurisdiction that is given to the federal judiciary, where a State is a party, is vested in the Supreme Court, and, with certain exceptions, in that Court exclusively. The case before the Court comes not within any of the exceptions; so that, if it be a case of federal jurisprudence, it is exclusively vested in the Supreme Court.

1824.
Osborn v. U. S. Bank.

Should it be conceded, that the State cannot be sued in the Circuit Court, and an attempt made to sustain the case and the jurisdiction against the individuals, upon the ground of necessity, lest there should be a failure of justice, it may be answered: First, that the reasons which exempt the State from direct responsibility, operate at least equally strong to exempt her from indirect responsibility. No necessity can warrant a judicial tribunal in disregarding the maxim, that that which cannot legally be directly done, cannot rightfully be effected by indirection.

A second, and a more decisive answer, may be given: the supposed necessity does not exist. The case arises under the constitution and the charter. A suit direct against the States, may be prosecuted in the federal Courts. The constitution has made the State amenable to justice before the Supreme Court of the nation. The national Legislature have provided that this jurisdiction shall be exclusive. It cannot be defeated or evaded by the selection of improper parties, in subversion of established practice, and of correct and

1824.

Osborn v. U. S. Bank.

well settled principles. The bill might have been filed in the Supreme Court; the injunction might have been allowed by a Judge of that Court in vacation; the whole case might have been proceeded in as the framers of the constitution intended. The high and solemn measure of citing a sovereign State before a Court of judicature, to defend its attributes of sovereignty, and the exercise of its power, ought not to be permitted to any authority but the highest tribunal of the nation I say nothing of consequences; I look only to what is fit and proper in itself, adapted to the nature of man, to the organization of government, and consistent with the plain letter of the constitution.

If this were not the case, if the constitution had conferred jurisdiction, but Congress had omitted to make provision for exercising it by the Supreme Court, in an original form, still no necessity can justify an evasive assumption of it by any tribunal, much less by one to which the constitution never intended to intrust it. The Bank must take the consequences, as in the case of other men who transact business, where Congress have failed to make provision for vesting in the Courts all the jurisdiction conferred by the constitution.

In the case of *M'Intire v. Wood*, before cited, this Court said, "When questions arise under the constitution of the United States, in the State Courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court; and this provision the Legislature has thought *sufficient, at present*, for all the political purposes to be answered by

the clause of the constitution which relates to the subject." It must *remain sufficient* until the law is changed, whatever inconvenience may result to individuals.

If, then, the case made in the bill be, in fact, a case against the State, in which the State is the sole party interested, and the defendants only ministerial agents, then the decree is erroneous, (1.) because the proper parties are not before the Court; (2.) because the Circuit Court cannot, under either the constitution or laws of Congress, exercise jurisdiction over the proper party; (3.) because both the constitution and law vests *exclusive* jurisdiction of the case made in the Supreme Court.

7. The last and the most important point in the case remains yet to be considered. It is, that the decree assumes that the Bank of the United States is not subject to the taxing power of the State of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

Upon this point, we ask the Court to reconsider so much of their opinion in the case of *M'Culloch v. Maryland,* as decides that the States have no rightful power to tax the Bank of the United States.

The question, whether the Bank of the United States, as now constituted, is exempt, by the constitution of the Union, from the taxing power of the State, depends upon the nature and character of the institution. If it stands upon the same foundation with the mint and the post office; if its business can justly be assimilated to the process

1824.
Osborn
v.
U. S. Bank.

and proceedings of the federal Courts, we admit, without hesitation, that it is entitled to the exemption it claims. The States cannot tax the offices, establishments, and operations, of the national government. It is not the argument of the opinion, in *M'Culloch v. Maryland*, but the premises upon which that argument is founded, that we ask the Court now to re-examine and reconsider.

Banking is, in its nature, a private trade; and is a business in which individuals may at all times engage, unless the municipal law forbid it. Where this is not the case, it is competent for individuals to contract together, and create capital to be employed in lending money, and buying and selling coins, bullion, promissory notes, and bills of exchange. No law is necessary to authorize a contract between individuals for concentrating capital to be thus employed; nor does the business itself depend upon any special laws for its creation or existence. An association thus formed, may take to themselves a name, and may establish rules and regulations to govern them in the transaction of their business, and to determine their relative rights and duties among themselves. The general law not only recognises the obligation of this contract between the parties; it recognises also the capacity of the association thus formed, to make contracts in the name they have assumed, and the right of the individuals, as joint partners, or one party, to enforce those contracts. The whole is a private concern: the capital is private property; the business a private and individual trade; the

convenience and profit of private men the end and object. Such is the true character of a bank, constituted by individual stockholders. Its rights and privileges, its liabilities and disabilities, are all the rights, privileges, liabilities, and disabilities of private persons.

If the individuals thus associated apply for and obtain, from the legislative power of the country, a special law, creating them a corporation, what change does it effect in their condition? A better answer cannot be given, than that contained in the definition of a corporation by this Court: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. *It is chiefly for the purpose of clothing bodies of men with these qualities and capacities, that corporations were invented and are in use.*"[a]

a Dartmouth College v. Woodward, 4 *Wheat. Rep.* 634.

1824.

Osborn v. U. S. Bank.

If the character of a corporation, as here defined, be regarded in granting a charter to a banking company in the case stated, the change effected in the condition of a company by the charter, can be easily and readily comprehended. It relates to their character, not to their rights. It would not change the nature of their business, but would afford facility in transacting it. It would confer upon the whole one individual character, comprising, for particular purposes, the capacities of an individual; but it would exempt them from liabilities, only so far as an express exemption was stipulated or granted. By the charter, they would be constituted an invisible, intangible, and artificial being, capable of perpetual existence, and of acting as an individual in the management of their appropriate affairs. But this would operate only to change the form, it would not alter the substance of things. These would still consist of the individuals that composed the association, and of the business in which they were engaged.

This was distinctly decided in the case of the *United States Bank v. Deveaux*.[a] In that case it was contended, that the character of the individuals was completely merged in the charter of incorporation. But this Court adjudged otherwise; they determined that they could look behind the charter, and notice the character of individuals; and the cases and the principles upon which this decision is founded, also establish, that

[a] 5 *Cranch*, 84.

1824.

Osborn v. U. S. Bank.

Courts may look beyond the charter for all substantial and beneficial purposes.

When individuals, associated to carry on the trade of banking, apply to the Legislature of the country for an act of incorporation, they found their application upon some benefit to be derived to the public from conferring upon them the character they ask. This public benefit may consist of the facilities afforded to the State, in the management of its fiscal concerns; or it may consist in the convenience to the community in the transaction of mercantile and other money affairs. It may arise from the payment of annual revenue, or a stipulated sum, into the public treasury. If the benefit to the public be considered a sufficient compensation for the faculty conferred, the corporation is created. But from this fact, in the language of this Court, "nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created."[a]

If, then, a banking association be formed, the capital collected, the mode of transacting the business settled, and the whole concern regulated and established, before any application be made for a charter, it is clear that the mere fact of enacting a law, creating the association a corporation, could not change its character. It was a company of

a Dartmouth College v. Woodward, 4 *Wheat. Rep.* 638.

1824.

Osborn v. U. S. Bank.

individuals, conducting a private trade, before it was incorporated, and it retained the same character afterwards. The charter was granted to give facility to the individuals in the management of their private affairs; not that, in virtue of that charter, they might share in the civil government of the country. For special purposes, it constituted them an immortal being; but of this being it has been correctly said, that "its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person."[a]

If in fact the incorporation be obtained before the association is formed, does it vary the principle? It is supposed and insisted that it does not. If the corporation be originated for the management of an individual concern; if it be based upon contract between individuals; if its great end and principal object be private trade and private profit, its character must be the same, whether the trade commenced precedent or subsequent to the incorporation; whether the individuals solicited the charter, or the Legislature invited the individuals. The character of the association must be ascertained by the same rules, and it must be subject to the same legal consequences.

We may suppose, then, that individuals resident in every part of the Union, and in foreign countries, have associated for the purpose of establishing a bank, with a capital of 28,000,000 of dollars; that they have actually collected this ca-

[a] 4 *Wheat. Rep.* 656.

pital together in the city of Philadelphia, and, no law prohibiting such a measure, have commenced trading as bankers. Not finding sufficient employment for their capital at that place, they establish a banking house in New-York, one in Boston, and one in Baltimore, where they carry on a profitable business. It is perfectly clear, that all this may be done, if no State law be contravened, by individuals in their natural capacities. But it is equally clear, that the capital thus employed, and the business thus transacted, must be subject to the regulations of the respective States, and that the parties must be subject to all the inconveniences and embarrassments resulting from the death of its members, and from the transfers of its shares and interests; from the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for transferring their property, as well as the still greater inconvenience of pursuing its rights and enforcing its contracts in Courts of justice.

Deriving great advantage from its trade, anxious to extend it into other States, and to be relieved from the embarrassments incident to a joint stock company not incorporated, the corporation apply to the Congress of the United States for an act of incorporation. But this Congress cannot confer, unless the association can be employed by the national government in the execution of some of the powers with which it is invested by the constitution. All the powers of the government must be carried into operation by individual agency, either through the medium of public officers, or contracts made with individuals. Can any public office be created,

1824. Osborn v. U. S. Bank.

or does one exist, the performance of which may, with propriety, be assigned to this association, when incorporated? If such office exist, or can be created, then the company may be incorporated, that they may be appointed to execute such office. Is there any portion of the public business performed by individuals upon contracts, that this association could be employed to perform, with greater advantage and more safety to the public, than an individual contractor? If there be an employment of this nature, then may this company be incorporated to undertake it.

There is an employment of this nature. Nothing can be more essential to the fiscal concerns of the nation, than an agent of undoubted integrity and established credit, with whom the public moneys can, at all times, be safely deposited. Nothing can be of more importance to a government, than that there should be some capitalist in the country, who possesses the means of making advances of money to the government upon any exigency, and who is under a legal obligation to make such advances. For these purposes the association would be an agent peculiarly suitable and appropriate. There are also other minor employments, such as the transmission of the revenue from one place to another, for the performance of which this company would be a most safe and certain agent. As, then, this association may be thus connected with the public interest, and made useful and advantageous to the government, by conferring a charter upon them, the power of securing to the nation these benefits, advantages, and con-

veniences, results to the National Legislature. A just construction of their constitutional powers, invests them with authority to incorporate a banking company, upon the basis of contracting with the institution thus created, for the performance of certain public employments, beneficial to the nation, and necessary to be performed by some one.

1824.
Osborn v. U. S. Bank.

The mere creation of a corporation, does not confer political power or political character. So this Court decided in *Dartmouth College v. Woodward*, already referred to. If I may be allowed to paraphrase the language of the Chief Justice, I would say, a bank incorporated, is no more a State instrument, than a natural person performing the same business would be. If, then, a natural person, engaged in the trade of banking, should contract with the government to receive the public money upon deposit, to transmit it from place to place, without charging for commission or difference of exchange, and to perform, when called upon, the duties of commissioner of loans, would not thereby become a public officer, how is it that this artificial being, created by law for the purpose of being employed by the government for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? because the government has given it power to take and hold property in a particular form, and to employ that property for particular purposes, and in the disposition of it to use a particular name? because the government has sold it a pri-

1824.
Osborn v. U. S. Bank.

vilege for a large sum of money, and has bargained with it to do certain things; is it, therefore, a part of the very government with which the contract is made?

If the Bank be constituted a public office, by the connexion between it and the government, it cannot be the mere legal franchise in which the office is vested; the individual stockholders must be the officers. Their character is not merged in the charter. This is the strong point of the *Mayor and Commonalty v. Wood*, upon which this Court ground their decision in the *Bank v. Deveaux*, and from which they say, that cause could not be distinguished. Thus, aliens may become public officers, and public duties are confided to those who owe no allegiance to the government, and who are even beyond its territorial limits.

With the privileges and perquisites of office, all individuals holding offices, ought to be subject to the disabilities of office. But if the Bank be a public office, and the individual stockholders public officers, this principle does not have a fair and just operation. The disabilities of office do not attach to the stockholders; for we find them every where holding public offices, even in the national Legislature, from which, if they be public officers, they are excluded by the constitution in express terms.

If the Bank be a public institution of such character as to be justly assimilated to the mint and the post office, then its charter may be amended, altered, or even abolished, at the discretion of the National Legislature. All public offices are crea-

1824.

Osborn v. U. S. Bank.

ted purely for public purposes, and may, at any time, be modified in such manner as the public interest may require. Public corporations partake of the same character. So it is distinctly adjudged in *Dartmouth College v. Woodward.* In this point, each Judge who delivered an opinion concurred. By one of the Judges it is said, that "public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interest belongs also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank, created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So, a hospital created and endowed by the government for general charity. *But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature.* The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much

1824.

Osborn v. U. S. Bank.

so, indeed, as if the franchises were vested in a single person."[a]

If the Court adopt this reasoning of one of themselves, the point is decided. The act of incorporation, in the case supposed, does neither create a public office, nor a public corporation. The association, notwithstanding their charter, remain a private association, the proprietors and conductors of a private trade, bound by contract, for a consideration paid, to perform certain employments for the government.

The qualities and capacities which are ordinarily conferred upon a private corporation, have already been stated. These Congress must have power to confer, for they cannot create a corporation, unless they can confer the qualities and capacities requisite to its constitution. It must be remembered, that this power in the National Legislature, to create a private corporation, is not a general, but a special power, limited to cases where the corporation, when created, may be employed by the government as an appropriate agent in the transaction of public affairs. It is not essential to the creation or existence of a corporation, that any uncommon or extraordinary privilege or exemption should be conferred upon it. It is therefore, beyond question, that the admitted power of creating, in its strict and proper sense, does not include or imply a power to exercise discretion in conferring privileges. If this be attempted, it is

[a] 4 *Wheat. Rep.* 668.

open for inquiry, whether such privilege be compatible with the constitution.

Before the act of incorporation, the association, we have supposed, was necessarily subject to the law of the State in which it transacted business; that law, whatever it might be, entered into and operated upon all their contracts. By that law, their property was protected, and for that protection the property was subject to equal rateable taxation. The ordinary qualities and capacities conferred upon a corporation, would not place the protection of the property under a different law, nor exempt it from bearing its proportion of legal burthens. To effect this, an extraordinary provision must be inserted in the charter. This kind of immunity is not incident to a corporation; the power to create one does not include the power to confer such immunity upon it. It is not essential to its creation or existence, and is not, therefore, within the sphere of national legislation.

A State is invested with constitutional power to levy a tax upon stamps, and may extend its operation to all the dealings of individuals. It cannot subject the transactions of the national government to the payment of such tax, because the operations of that government are national, and not subject to the power of any of its parts. If the nation borrow money, it is competent for the nation to decide upon the evidence to be given of the debt. It would be absurd to subject this national measure to the municipal regulations of one of its parts, and thus permit a part to assess a tax upon the whole. But if the national government

1824.

Osborn v. U. S. Bank.

incorporate a company of private bankers, who, before they received their charter, were subject to the payment of this tax, their subsequent exemption from it would not seem to be a necessary consequence, unless they were constituted a public institution. If they remained mere private dealers, with only increased facilities, and a new faculty conferred upon them, it would seem a rational inference, that their private duties and liabilities also remained. Supposing them to remain a private corporation of trade, the tax collected from them would be abstracted, not from the national treasury, but from the pockets of private men. The supposition, that this tax is incompatible with the capacity to trade, conferred in the charter, proceeds upon the hypothesis, that that capacity partakes of the character of the government that confers it, and is, therefore, supreme. Unquestionably such would be the fact, if the Bank were a public corporation; if it were created by the government for its own uses; and if the stock were exclusively owned by the government. But if it remain a private corporation, then the capacity given in the charter ought to be regarded as that which is adapted to the character of the party receiving it: a capacity properly appertaining to private individuals, which necessarily imports, that it is to be enjoyed like other individual rights, subject to the municipal law.

A stamp duty is one mode of collecting revenue from individuals engaged in private trade, but it is not the only mode. The principle which exempts the Bank of the United States from the

payment of a stamp duty imposed by a State, is supposed to exempt it from the payment of any tax assessed by State authority. It is deemed an incident attached to the charter, because that charter is conferred by the supreme authority. It is said, that if any other than the supreme authority that confers the faculty, is permitted to tax the trade or business to be carried on under it, the faculty itself may be rendered useless, and the object of granting it entirely defeated. The power to confer the faculty, and the power to tax the business, if vested in different hands, are thus held to be incompatible, and from this incompatibility the exemption is deemed a necessary incident to the charter, because, without it, it cannot exist. For we must here repeat, that this Court have said, that a corporation "possesses only those properties which the charter of its creation confers upon it, either expressly, or as *incidental to its very existence.*"[a]

This position involves several inquiries, which may be embraced in an examination of the reasons assigned for considering this exemption as an incident attached to the charter, and in an investigation of the powers of Congress to confer this exemption, in express terms, if it cannot be sustained as incidental to the very existence of the Bank.

The fact, that a private corporation, created by the sovereign or supreme power, is not, therefore, clothed with any portion of the political character

[a] 4 *Wheat. Rep.* 686.

1824.

Osborn v. U. S. Bank.

or political power of its creator, is asserted by the concurring opinions of the Judges of this Court, and is established by its judgment in the case of *Dartmouth College v. Woodward.* That an exemption from taxation for public purposes, by an inferior legislative power, is not incident to a corporation created by the supreme power, is a just inference from the doctrines laid down in the case just cited, and from the whole history of private corporations, down to the decision of this Court in *M'Culloch v. Maryland.*

The power of assessing taxes is always a legislative power; but in our government, and in that of England, from which many of our institutions, and most of our principles of jurisprudence are derived, this power is exercised by other authorities than the National and State Legislatures. Counties, cities, towns, boroughs, and townships, have bodies of magistracy authorized to assess taxes for various specific purposes. We have the high authority of Lord Coke himself, that the Justices of a city, shire, or riding, in England, might assess a tax upon the property of a corporation for the repair of bridges.[a] And in *The King v. Gardner,*[b] it was decided by the Court of King's Bench, that a corporation was subject to be assessed for poor rates, even as a corporation. In these cases, it was not pretended that exemption from taxation was an incident to the corporation.

a 2 *Inst.* 697. 700.
b *Cowp.* 83.

If a State Legislature incorporate a company to construct a turnpike road, such charter would be predicated upon the advantage the community would derive from the road; yet no man would suppose that the horses, cattle, carriages, and other implements employed and used by the company, would be exempt from county levies, poor rates, and other burthens to which the other property of the individuals was subject. And if a general tax upon business or income was assessed, it would not be pretended that the amount received for tolls would be exempt from this tax, upon the ground that a right to have the corporate property and corporate business exempt from taxation, was an incident of the charter. This argument is applicable to every species of individual business conducted by private corporations. If exemption from any particular tax be claimed, it is founded upon a privilege specifically granted in the charter, it is not claimed as an incident to the grant.

It is not uncommon, that almost every species of business carried on within the boundaries of a city, is subject to be taxed by the city magistracy, for city purposes. Should this general authority to tax, extend to bankers, money-lenders, brokers, and others trading in money, notes, stocks, bills of exchange, &c., would the mere fact, that the sovereign authority granted to the individual or individuals carrying on any one of these employments, a corporate character, operate to exempt such individual or individuals from the payment of a city tax, to which he was liable before the corporate character was bestowed upon him?

1824.

Osborn v. U. S. Bank.

Private corporations, emanating from State authority, and ultimately connected with the private and public welfare, are numerous in all our commercial cities. Such are fire and marine insurance companies. Are these regarded as exempt from taxes assessed by the city magistrates? Have they ever claimed such exemption? Has it ever been conceded to them? In all the cases put, it is evident, that the body of inferior magistracy, authorized to levy a tax, if they be not limited as to the amount, which is frequently not the case, may assess upon the corporation an amount which their business could not pay, and thus defeat the object for which the charter was obtained. That such exemption, as an incident of their charter, has never been claimed by such corporations, is strong proof that it was not supposed to exist.

It may be said, that the inferior magistracy and the corporations, in the cases supposed, both derive their authority from the same source, and that it is competent for the authority that created both, so to regulate and control their operations, as to prevent one from being destroyed by the other. This may be granted, without affecting the argument. If the exemption be incident to the corporation, regulations are unnecessary. The power of the national Legislature to confer this exemption, upon a corporation created by it, in express terms, is one thing. That it exists as an incident to the charter, without any express provision, is a very different proposition.

It is distinctly admitted, in the case of *M'Culloch v. Maryland*, that the real property of the

Bank may be taxed, and that the stock held by residents of the State may be taxed. But it is asserted, that the operations of the Bank are exempt, because they are the means of the national government; and it is only by the total exemption of the operations of the Bank from the taxing power of the States, that our institutions can be relieved from the absurdity of a power, in one government, to pull down what another may build up, and a right in one government to destroy what there is a right in another to preserve.

But if the real property of the Bank and its stock may be taxed, it is as completely within the power of the States to destroy it by taxation, as it is by taxing its operations. The States may tax the stock owned by its citizens, so high as to compel them to retain it at a loss. Every State in the Union, by adopting this course, may paralize the operations of the Bank, as effectually as in any other mode. If the States act in concert, there is an end of the Bank; and that which the national government have built up, is prostrated by the States. The concession, then, that the exemption is qualified, admits the very mischief which it is set up to prevent. Whatever misapprehension may have prevailed with respect to the operations of the Bank, it certainly never can be asserted, that the individual stock of the members, or the real estate of the company, are the means of the government, and, as such, exempt from taxation. And while these are subject to taxation by the States, it would seem difficult to sustain the position upon

1824.

Osborn v. U. S. Bank.

which the operations of the Bank are held to be exempt.

We can well understand, how an absolute exemption may be a consequence of the character of the corporation established. Certainly it would be an incident of this Bank, were it established solely for public use, and were the stock wholly owned by the nation. But a qualified exemption must, in its very nature, depend upon specific provision. It is so connected with considerations of policy, and interwoven with the exercise of discretion, that it cannot be conceived, how it is to exist otherwise than by special creation or enactment.

No such exemption, either general or qualified, has heretofore been regarded as an incident to the creation of a private corporation. On the contrary, every corporate privilege beyond the creation of individuality of character and of capacity, has been founded upon special grant. In the case of *Head v. the Providence Insurance Company*,[a] this Court declared, that a private company, "in its corporate capacity, is the mere creature of the act to which it owes its existence. It may correctly be said, to be precisely what the incorporating act has made it, and to be capable of exerting its faculties only in the manner in which that act authorizes." And this principle has been recognised in every case where the rights, privileges and powers of a corporation have been considered, except in respect to the Bank.

[a] 2 *Cranch*, 167.

1824.

Osborn v. U. S. Bank.

If we examine the claim of this particular corporation, to attach to itself this exemption, as incident to its charter, upon what ground is it to be distinguished from private corporations generally? It is said, that it is an instrument employed by the national government in the execution of its powers, and for that reason cannot be taxed; that, in this particular, it is distinguishable from all other corporations.

In what sense is it an instrument of the government? and in what character is it employed as such? Do the government employ the faculty, the legal franchise, or do they employ the individuals upon whom it is conferred? and what is the nature of that employment? does it resemble the post office, or the mint, or the custom house, or the process of the federal Courts?

The post office is established by the general government. It is a public institution. The persons who perform its duties are public officers. No individual has, or can acquire, any property in it. For all the services performed, a compensation is paid out of the national treasury; and all the money received upon account of its operations, is public property. Surely there is no similitude between this institution, and an association who trade upon their own capital, for their own profit, and who have paid the government a million and a half of dollars for a legal character and name, in which to conduct their trade.

Again: the business conducted through the agency of the post office, is not in its nature a private business. It is of a public character, and the

1824. charge of it is expressly conferred upon Congress by the constitution. The business is created by law, and is annihilated when the law is repealed. But the trade of banking is strictly a private concern. It exists and can be carried on without the aid of the national Legislature. Nay, it is only under very special circumstances, that the national Legislature can so far interfere with it, as to facilitate its operations.

Osborn v. U. S. Bank.

The post office executes the various duties assigned to it, by means of subordinate agents. The mails are opened and closed by persons invested with the character of public officers. But they are transported by individuals employed for that purpose, in their individual character, which employment is created by and founded in contract. To such contractors no official character is attached. These contractors supply horses, carriages, and whatever else is necessary for the transportation of the mails, upon their own account. The whole is engaged in the public service. The contractor, his horses, his carriage, his driver, are all in public employ. But this does not change their character. All that was private property before the contract was made, and before they were engaged in public employ, remain private property still. The horses and the carriages are liable to be taxed as other property, for every purpose for which property of the same character is taxed in the place where they are employed. The reason is plain: the contractor is employing his own means to promote his own private profit, and the tax collected is from the individual, though assessed upon the

means he uses to perform the public service. To tax the transportation of the mails, as such, would be taxing the operations of the government, which could not be allowed. But to tax the means by which this transportation is effected, so far as those means are private property, is allowable; because it abstracts nothing from the government; and because, the fact that an individual employs his private means in the service of the government, attaches to them no immunity whatever.

It is only in this character, that the Bank is in public employ. The business it transacts for the government, originates in contract. It receives the public treasure upon deposit, and pays it out upon the checks of the proper officer. This is an individual business, transacted for the government precisely as if it were an individual concern. It receives the cash of individuals upon deposit in the same manner, and in the same manner pays it out. It is one department of its trade, by which it makes individual profit. Any private person, or moneyed corporation, may be employed to do the same thing; and as to that, would be in the employment of the government; would be an instrument used by the government: a means of executing its powers. Yet it has never been supposed, that such employment constituted a public office, or that the person employed was thereby invested with official character. All these contracts are made with a view to the profitable employment of individual exertion, and are performed by individual means, in the private personal character of the contractor. They are, of course, subject to

1824. Osborn vs U. S. Bank.

the municipal law; by it they must be protecte and enforced, and, therefore, cannot be exemp from its exactions.

The carriages and horses of the contractor fc transporting the mail, is a stronger case than th of the Bank. The transportation of the mail the principal object for which the team and veh cle are engaged; the business of carrying passer gers and baggage, is merely incidental. Publi service is the first great object; its employmer as a means of travelling, by individuals, is but s condary. But in the case of the Bank, the pr vate trade of the company is the great object pursuit, and the end of their exertions; the pul lic business is subordinate and incidental, and i in reality, a very essential means of promotir that private gain, which is the principal, if not tl sole object of the corporation.

Again—In the case of the mail, the contract receives a stipulated sum, as a compensation f his services. He takes upon himself a burthe some and hazardous employment. But the Ban on the contrary, receive a privilege, a substanti pecuniary advantage, resulting necessarily in tl augmentation of the private individual wealth the stockholders; of this advantage they are tl purchasers, not for the public account, but for p vate use.

The post office, as such, that is, the mere leg entity created by the law, cannot be taxed, becau it is a public institution. The moneys receiv for postage cannot be taxed, because they are pu lic property. This immunity attaches to their pu

lic character. But the building in which the post office is kept, is a proper subject of taxation, because it is private property; and the fact, that it is an instrument used or employed by the government, in the execution of its powers, attaches to it no immunity.

The mint, the custom house, the process of the federal Courts, bear still less analogy to the Bank than the post office. They partake less of the character of private business. The functions they perform are more palpably of a public nature, requiring the personal agency of individuals, rather than the employment of private property in their performance; especially the papers of the custom house, and the proceedings of the federal Courts. However much individuals may be interested in the existence and preservation of these documents, yet they are not, in their nature, subjects in which a right of property can be acquired. If it ever could have been supposed that these were subjects of taxation by the States, the argument of the opinion in the case of *M'Culloch v. Maryland*, demonstrates the absurdity of such supposition. Because to all these institutions exemption from State taxation is attached, as an incident essential to their very existence, it does not follow that the same exemption attaches to the Bank, unless its character, end, and object, are the same. It seems to us impossible that this can be maintained. If it cannot, what is there peculiar to the constitution of this corporation, that should attach to its charter an exemption not incident to other corporations? Surely some foundation for this very ex-

1824.

Osborn v. U. S. Bank.

traordinary character, unknown to other establishments of the same nature, ought to be made out by those who claim it.

I am aware, that an indefinite, indistinct, confused idea exists, by which the charter, and the private trade, and the stockholders, and the government, are combined together, and the whole made to produce a something which cannot well be defined, but which is called a public institution. This might produce some legal effect, if we were compelled to contemplate this something only as a creation of the national government, by the name of *the Bank of the United States*. If its legal envelope, and legal name, constituted its whole character, or if these could be used so as to shut out all further inquiry into that character, its claim to the incidents and immunities of a public institution might rest upon some sort of foundation. But this misconception of its character vanishes, when we are permitted to examine all its constituent parts. We have seen that the persons who compose it are not public officers; that the business it pursues is not a public business, and that its agency for the government is that of a private individual: from none of which it can derive any exemption not common to private corporations.

The charter itself, abstracted from the individuals upon whom it is conferred, must be without any operative effect. It is in the nature of a grant; but a grant is nothing, unless there be a grantee to take, as well as a subject to be granted. When an association of individuals is formed, and entitle themselves to a grant of corporate franchises,

so as to give operative effect to that grant, they acquire in it a private vested right; it becomes their private property; and so long as they comply with its terms, they can no more be disturbed in the possession of it, by the grantors, than by a third person or stranger. Such is the situation of the Bank. The charter is their property, derived, to be sure, from a public grant, but, nevertheless, as distinctly the private property of the individuals, as if derived from a contract or grant from individuals, its former proprietors. Why is it an incident to this species of property, that it should be exempt from taxation by the States?

One reason only is offered. It is granted by the national government; and if the States can tax it, they may, in effect, render it useless to the grantees. But the States may confessedly exercise this power over the employments and property of individuals. All property is held subject to it, when held by individuals, no matter whence it is derived. In Ohio, the State cannot tax the public lands, while owned by the government, nor for five years after they become the property of individuals. She is bound by compact on this point. But it never was conceived, that because it was once owned by the nation, and the title to the individual derived from a national grant, the States could not tax it. Restricted as this power of taxation is in the State of Ohio, yet there can be no possible difficulty in so employing it, as to defeat all future sales of public lands within that State. It is only to provide by law for assessing such tax upon all lands hereafter sold, to be collected after

1824.
Osborn v. U. S. Bank.

the expiration of five years from the sale, as would render the lands a burthen to the proprietor, and the object would be effected. Yet the power to do this would hardly be held a sufficient ground for attaching to lands thus sold, an exemption from State taxation as incident to the grant. Why should a grant of franchises be distinguished from a grant of land, when the grantee, in both cases, receives it in confirmation of a purchase from the government, to be held as his own individual property? We are warranted by the opinion of at least one of the Judges of this Court, in asserting, that "a grant of franchises is not, in point of principle, distinguishable from a grant of any other property."[a] If this be correct, then there can be no reason for attaching any exemption to a grant of franchises, because the grant is conferred by the national government. The grantee must hold the property subject to all the burthens which might be imposed upon it, had he obtained it from any other source.

It may be objected, that this doctrine asserts a power in the States to tax the patent rights granted by the national government. And why not? By the grant it is constitued individual property; but does the power conferred upon the national government, to secure to the authors of useful inventions the exclusive use of their machines, necessarily attach to the patent for such exclusive right an exemption from taxation also? Is it not enough, that the inventor of a new species of pro-

[a] 4 *Wheat. Rep.* 684.

perty may be secured in a monopoly of its employment? Does the mere fact of conferring such monopoly, of necessity imply a right to enjoy it exempt from the burthens to which other property is subject? How far is this exemption to be carried? Would it exempt a steam loom from a general tax upon looms? or a steam mill from a general tax upon mills? Would a barrel of flour be subject to taxation, if, in the process of manufactory, it were carried from the meal chest to the cooling room upon a miller's shoulder; but exempt if it were hoisted by elevators, or gathered to the bolt-hopper by a hopper boy? Does this exemption attach to the grant, only in the hands of the monopolist, or extend also to his grantees of the monopoly? Is the exemption to be withdrawn so soon as the invention passes into the hands of the mechanic for practical purposes? or does it adhere to the machinery, and attach to the fabric manufactured? At whatever point it is withdrawn, the same consequences may follow. The power of State taxation, if it attach at all, may be so used as to render the patent of very little value. If the patent itself, or the machinery when constructed, or the employment of such machinery, or the fabrics manufactured by it, may be taxed, an excessive tax can, in one way as well as another, affect the benefits derived by the patentee from the patent, and may even prevent its use. Still, in this respect, it stands upon the same footing with other private property, and there is no sound reason for conferring upon it any

1824. Osborn v. U. S. Bank.

higher privilege. Every thing in the nature of property, produced by the labour of the husbandman and the mechanic, may be taxed. They have no other security that the tax may not be excessive and oppressive, than what is afforded by their weight in the government, and a sense of justice in legislative assemblies. If the powers of genius be so applied as to produce any thing in which the inventor claims a property, this product of labour must be treated as other productions of the same class. No special exemptions are necessary incidents of its invention or creation. So far, then, as there is a just analogy between the Bank and patent rights, so far they are alike to be looked upon as private property, and no exemption from taxation can be conceded to either, as an incident of the franchise conferred upon them by a grant from the National Legislature.

Last of all, this exemption from taxation is not an incident essential to the very existence of the Bank; the Bank may exist without it; may exist beneficially without it, as we contend, did exist for twenty years without it, and was extensively useful. This exemption may conduce much to its convenience, and, perhaps, very considerably to its profit. But many things may be convenient and beneficial in the account of mercantile profit or Bank dividends, which are not necessary to the very existence of the corporation. Certainly the exemption from taxation is of this character. It is not incident to the corporation. If necessary to secure to it the most beneficial uses of its corporate franchises, it must obtain it by a special

grant; it must be specially inserted. An inquiry, how far Congress have constitutional power to do this, were they to attempt it, would still further elucidate the erroneous character of the position, that it is an incident of the charter, independent of special grant.

1824.
Osborn v. U. S. Bank.

Mr. *Clay*, for the respondents, declined arguing the question of the right of the State of Ohio to tax the Bank, considering it as finally determined by the former decision of the Court, which was supported by irresistible arguments, to which he could add no farther illustration. But this was not, like the law of Maryland, a case of taxation. It was a law enacted for the purpose of expelling the branches of the Bank from the State of Ohio, by inflicting penalties amounting to a prohibition. It might be called a bill of pains and penalties. An examination of its provisions, would show, that the penalties were greater in amount than the entire dividends. It was unequal and unjust in its operations. It was a confiscation, and not a tax. It was the same on the branch at Cincinnati, which had a capital of one million and a half, with that at Chilicothe, which had only a capital of half a million of dollars. It was obvious, that if one State could, in this manner, expel one of the offices of discount and deposit from its territory, every State might do the same thing. If one State may expel a branch, another State may expel the parent Bank itself; and thus this great institution of the national government, would be extirpated and de-

1824.

Osborn v. U. S. Bank.

stroyed by the local governments, within whose territory it was established.

Is it possible, that against this highly penal law, there is no preventive, peaceable remedy? that the Bank must submit to the alternative of withdrawing its branches, or of paying the penalty? that it must do this, not for one year, but for the whole period of its existence? Is it possible, that our jurisprudence should be so defective, that the law of the whole may be defeated in its operation by a single part? that if a State should lay a duty on imports or tonnage, contrary to the express provisions of the constitution, no adequate means could be found to prevent its collection by the officers of the State government?

All these propositions must be maintained by our opponents, or they must surrender their cause. It is, accordingly, contended by them, that the remedy is misconceived, (1.) because the State is not made a party. But if such parties are before the Court, as will enable it to make an effectual decree, it will proceed, although there be improper parties made, or parties omitted, who might have been made. Such is the practice where jurisdiction is sustained in the Circuit Court against some parties, against whom an effectual decree can be made, although others are omitted, on account of their being absent, or citizens of the same State with the plaintiff. The true ground seems to be, that if the Court can give redress; if its decree can be rendered effectual; if the party can

be put in possession of the thing claimed, the Court will proceed. Here the party omitted, is a sovereign State, who is entirely exempt from jurisdiction. The Court will, therefore, proceed against the other proper parties.

But it is also insisted, that the remedy is misconceived, because a State is the real party defendant. We deny that a collateral or contingent interest, will necessarily make a party who must be joined.

The State is not a formal party on the record; and that the State is not necessarily a party, by reason of its incidental interest, is conceded by the admission, that the Bank might have recovered in trover, trespass, or detinue, against the defendants, who actually took the money. That the suit concerns the public acts of an officer of the State government, who is one of the defendants, does not make the State itself a necessary party. This is the settled law of the Court. In the case of the *United States v. Peters*,[a] it was held that, although the interests of a State may be ultimately affected by the decision of a cause, yet if an effectual remedy can be had, without making the State a defendant to the suit, the Courts of the United States are bound to exercise jurisdiction. So, in England, in the Grenada case, the fiscal rights of the sovereign were drawn directly in question, and finally determined, in a suit brought by an individual, to recover back from the collector of the customs of the island, the amount of duties unconsti-

[a] 5 *Cranch*, 115.

1824.

Osborn v. U. S. Bank.

tutionally levied by that officer.[a] The party there was not compelled to resort to his petition of right, or any other mode of proceeding peculiar to claims against the crown. The immunity of one of the States of this Union from suits in the Courts of justice, is not greater than that of the crown in England. The constitution merely ordains, that a State, in its sovereign capacity, shall not be sued. It does not ordain, that the citizen shall not have justice done him, because a State may happen to be collaterally interested. It does not ordain that a law of the United States shall be violated, to the prejudice of a citizen, because a law of the State happens to come under consideration. If the State of Ohio is a party, so is the government of the United States a party in its sovereign interests, which are more sacred and important than mere proprietary interests. But even if the State be a party, that circumstance would not oust the jurisdiction of the Court, in a case arising under the constitution and laws of the Union. There the nature of the controversy, and not the character of the parties, must determine the question of jurisdiction. Such is conceived to be the spirit and effect of the decision of the Court, in the case of *Cohens v. Virginia*. It is competent for Congress to determine what Court shall have jurisdiction in this class of cases, which it has done as to the Bank, by giving it the right of suing in the Circuit Courts of the Union.

Again; if the State is to be considered a party,

a Campbell v Hall, *Cowp.* 204.

1824.

Osborn v. U.S. Bank.

it is a party plaintiff. The State is the actor, and the Bank is a defendant. In form it may not be so, but the substance is to be regarded. The injunction is essentially a defensive proceeding. Suppose the State, or even the United States, had recovered a judgment against the Bank, might not the proceedings upon that judgment be enjoined? And is the nature of the case varied, because the proceeding is here *in pais?* Suppose the State had proceeded by distraining for the tax, and the Bank had replevied, who would have been both the real and technical plaintiff in that case? The whole case is to be considered according to its true nature and character, which is, that of a proceeding by the State to recover a tax or penalty; and the Bank resorts to its natural protector for defence, by means of an injunction, which is a parental, preventive, peaceable remedy.

It is said that this is a case of trespass only, and that the party ought to have been left to his appropriate remedy at law. But this is not a case of a solitary remediable trespass. It is one of annual, of repeated, vexatious occurrence, for which an injunction is the appropriate remedy. All injunctions are discretionary, and granted upon the peculiar circumstances of the case. The jurisdiction of a Court of equity as to injunctions, has been always considered a most useful one, and, of late years, they have been dispensed with a much more liberal hand than formerly. They are granted to prevent fraud or injustice; to stay proceedings in other Courts; to restrain the infringement of patent and copy rights; to restrain the

1824.

Osborn v. U. S. Bank.

transfer of negotiable instruments, where the transfer will defeat the object of the suit; to stay waste, in which case they have superseded the common law remedy by writ of estrepement. In the case of patents and copyrights, it is not necessary to establish previously the right at law, for it is grounded on an act of parliament, and appears by record.[a] The principle on which injunctions in all these cases are granted, is to prevent a wrong where damages would not give adequate relief. So, there are cases where bills of peace have been brought, though a mere general right was claimed by the plaintiff, and no privity between him and the defendants, nor any general rights on the part of the defendants, and where many more might be concerned than those brought before the Court. Such are bills for duties, as in the case of the *City of London v. Perkins*. In the present case, it is quite clear that it would be an idle mockery to compel the parties to resort to their legal remedy, which would be wholly inadequate to prevent the destruction of their franchise.

As to the formal objection of the defect of a warrant of attorney from the Bank, authorizing these proceedings, it is now too late to take that objection, even if it could have been available at any stage of the suit. It is matter of form only, which should have been pleaded in abatement. It is cured by the provisions of the Judiciary Act of 1789, ch. 20. s. 34.

[a] 1 *Madd. Ch.* 113. 123. 128. and the cases there cited.

1824.

Osborn v. U. S. Bank.

Mr. *Wright*, for the appellants, in reply, insisted, that a special authority must be shown for the institution of the suit in the name of a corporation, which could only appear by attorney, under its common seal. Admitting, however, that the corporation might, by a mere resolution of the board of directors, authorize the suit, following the analogy of the cases of *The Bank of Columbia v. Patterson*, and *Fleckner v. The Bank of the United States*, such resolution must appear on the record, in the same manner as a warrant of attorney. Nor are the defendants precluded by the appeal from taking advantage of this defect. A decree is a judicial act. Its validity depends upon there being a party before the Court, legally competent to ask it. A corporation can only appear by its attorney or solicitor, duly authorized; and if this authority is not apparent upon the face of the record, the decree is erroneous, and cannot be supported.

There are no proofs or admissions sufficient to charge the defendant, Sullivan. He knows nothing of his own knowledge. The information from his predecessor in office, Currie, is no proof. The bill charges, that he received the money as a deposit, without any interest in it. The answer states, that he receives and holds it as a public officer, and has no private interest in it. The case in 6 *Ves. jr.* 738. was a much stronger admission than this, and yet it was held insufficient. The answer of one defendant cannot affect another. The answer of a party having no interest, cannot affect a person having an interest. The

1824.
Osborn v. U. S. Bank.

answer of Sullivan and Currie could not affect the State of Ohio, against which the decree operated, and whose treasury was entered, in order to execute the writ of sequestration.

It is impossible to determine, whether the injunction is meant to be supported upon the ground of preventing an irreparable injury, or of protecting the franchise of the plaintiffs. No case has been shown of an injunction to prevent a mere trespass on chattels, or where the injury intended is not an interference in the enjoyment of the plaintiff's exclusive privileges, but only a trespass upon their property, for which they have an adequate remedy, by suit at law, in various forms of action. Mere general principles, upon which Courts of equity may have proceeded a certain length in interposing by injunction, will not warrant the extending this extraordinary remedy still further. Some analogous case must be found to support this injunction.

An injunction binds no person but the parties to the suit.[a] Here the sole interest is in the State of Ohio. She is, therefore, an indispensable party to the bill. But she cannot be made a party, because she cannot be sued. The inevitable consequence is, that the Court below cannot take jurisdiction of the cause. Where, indeed, the proceeding is *in rem*, or operates upon the subject matter in controversy, disconnected from the persons interested; if it can be shown that any person interested, who is subject to the jurisdiction of

a 7 *Ves.* 255. 4 *Johns. Ch. Rep.* 25.

1824.

Osborn v. U. S. Bank.

the Court, is absent beyond the reach of its process, it is not necessary to make such person a party. But here the party omitted is a sovereign State, who is within reach of process, but is not subject to the jurisdiction, and cannot be brought before the Court. The case of *Cohens v. Virginia* does not apply. That case relates exclusively to the appellate jurisdiction of the Supreme Court, and merely establishes the doctrine, that where the State commences a suit in its own Courts, and a question arises under the constitution, laws, and treaties of the Union, the defendant may bring the cause before this Court by appeal or writ of error. The appellate process is not considered as a suit against the State, within the meaning of the 11th amendment. The *Grenada* case, in England, is equally inapplicable.[a] It was an action of assumpsit, brought to recover back the amount of certain duties paid to the Collector of the island, and which had been retained in his hands, *by the consent of the Attorney-General*, for the express purpose of trying the question, as to the validity of the King's proclamation, by which the duties were imposed. The Court determined, that the King had precluded himself from the exercise of his power of prerogative legislation over a conquered country, by previously authorizing the establishment of a colonial Legislature, and, therefore, gave judgment for the plaintiff. The present suit is substantially a suit against the State. The 11th amendment to the constitution was intended to protect the State effectually

a *Cowp.* 204.

1824.

Osborn v. U. S. Bank.

from the suit of an individual, not to permit its sovereign rights to be drawn in question, and its property to be taken indirectly by suing its officers. In the case of the *United States v. Peters*, the interference of the State was by a law passed subsequent to the decree, and intended to operate directly upon it, and defeat its execution. A Court of law, from necessity, sometimes allows suits to be maintained against mere agents, who are the active parties, in cases of trespass or other torts; but it is the invariable practice of the Court of Chancery to proceed against the parties really interested, and the omission of any of them is a fatal defect. The policy which exempts the States from being sued in the Courts of the Union, is the same, whether the case arise under the constitution and laws of the United States, or whether the jurisdiction is founded upon the character of the parties. The terms of the exemption equally comprehend both classes of cases.

March 11th. The Court having expressed a wish that the cause should be re-argued upon the point of the constitutionality and effect of the provision in the charter of the Bank, which authorizes it to sue in the Circuit Courts of the Union, it was this day again argued upon that point, (in connexion with the case of the *Bank of the United States v. The Planters' Bank of Georgia*, in which the same question was involved,) by Mr. *Clay*, Mr. *Webster*, and Mr. *Sergeant*, for the jurisdiction, and by Mr. *Harper*, Mr. *Brown*, and Mr. *Wright*, against it.

1824.

Osborn v. U. S. Bank.

In favour of the jurisdiction, it was argued, (1.) that the jurisdiction was expressly and unequivocally conferred by the act of 1816, s. 7. incorporating the Bank. The terms used were free from all ambiguity, and they were introduced for the avowed purpose of giving jurisdiction to the Circuit Courts. In the case of the *Bank of the United States v. Deveaux*,[a] it had been decided, that the former national Bank had not, by virtue of its charter, a right to sue in the federal Courts. That charter gave it a right "to sue and be sued, in Courts of record, or any other place whatsoever," which it was determined did not confer the privilege of suing in the Courts of the Union, they not being expressly mentioned. But no doubt was intimated, that those Courts would have had jurisdiction, if they had been mentioned in the act. It was to supply this defect, that Congress adopted the phraseology which is contained in the present charter, giving the Bank power "to sue and be sued in all State Courts having competent jurisdiction, and *in any Circuit Court of the United States*." Power in the party "to sue," confers jurisdiction on the Court. Jurisdiction is always given for the sake of the suitor, never for the sake of the Court. It was most natural to give the privilege to the suitor, and that necessarily carries with it the jurisdiction; for without the jurisdiction, he cannot enjoy the right. To authorize the bringing of a suit, is to authorize a suit to be entertained. The patent laws, and many other sta-

[a] 5 *Cranch*, 61. 85. 86.

1824.

Osborn v. U. S. Bank.

tutes of Congress, have been construed to give jurisdiction by the use of similar terms.

2. That Congress had constitutional authority to confer this jurisdiction on the Circuit Courts. It was "a case arising under the constitution and laws of the United States." Every case, in which the Bank of the United States is a party, is, in the strictest literal interpretation of the clause, a *case* arising under a *law* and the constitution of the United States. But for the *law*, the *case* would never have existed. But for the continued existence of the law, it could not continue to exist. If, by any conceivable means, the law were to be determined, the case must be at an end. There is, therefore, an inseparable, indissoluble connexion between the law and the case, as cause and effect. The case owes its being to the law, and only to the law. The establishment of a corporation is a legislative creation of a faculty, of a moral being, invisible and intangible, but with capacities, powers, and privileges, rights and duties. The rights it may acquire, the wrongs it may suffer, the obligations it may incur, the injuries it may inflict, the acts it may do, its power to do, or to endure, are all derived from, and dependent upon, the charter. To the charter it owes its being, its continued existence, its qualities and properties. The charter defines its duties, and affords the only measure of its responsibilities. Every act it performs, derives its validity from the charter only; and whenever it deals with another, it deals under and according to the charter. In the same manner, whoever deals with it, deals under and according to the charter.

1824.

Osborn v. U. S. Bank

Its capacity to contract, and to sue and be sued, all are derived from that source. It cannot come into Court, without bringing the law in its hand. It is bound in every case to show, that it is acting within the limits of its corporate powers, as defined in that law. There can be no case, where the Bank is a party, in which questions may not arise under the laws of the United States. In every such case, it must appear, that it was duly created, continues to exist, has power to contract, and to bring the suit. All these are matters arising under the laws of the United States, and under no other. Suppose an officer created by act of Congress, could not Congress confer on him the privilege of suing and being sued, in his official capacity, in the Courts of the Union? Such an officer has two capacities, private and official, and may be subject to different jurisdictions, according as either is affected. But a corporation has but one capacity, and its faculties cannot be divided. Wherever an authority is given, all that is done by virtue of that authority, is done under it. Every thing done by the Bank, is done under the charter.

If it should be contended, that the character of the case depends upon the questions to arise in it, the answer is, that it is not so restricted by the constitution; and that it cannot be previously known, what particular questions may arise in the progress of the cause. The principal draws to it the incident, or accessory. The character of the case depends upon its general nature. Every suit brought by the Bank, is for the funds placed in its charge, under a law of the United States.

1824.

Osborn v. U. S. Bank.

But the question here, is about the exercise of a sovereign power, given for great national purposes. Those who framed the constitution, intended to establish a government complete for its own purposes, supreme within its sphere, and capable of acting by its own proper powers. They intended it to consist of three co-ordinate branches, legislative, executive, and judicial. In the construction of such a government, it is an obvious maxim, "that the judicial power should be competent to give efficacy to the constitutional laws of the Legislature."[a] The judicial authority, therefore, must be co-extensive with the legislative power.[b] It would be quite as reasonable to leave the execution of the laws of the Union to the State executives, as to leave the exposition of them to the State judiciaries. It was intended, that the federal judiciary should expound all the laws of the government, and that the federal executive should execute them all. This association is so inseparable, that the power of legislation carries with it the power of establishing judicial tribunals. It is so with respect to the power of exclusive legislation within the District of Columbia. So the power of establishing post offices and post roads, involves that of providing judicial means for the punishment of mail robbers. Most of the statutes for the punishment of crimes, are founded on the same basis. The great object, then, of the

a Cohens v. Virginia, 6 *Wheat. Rep.* 414.

b The *Federalist*, No. 80. Cohens v. Virginia, 6 *Wheat. Rep.* 384.

constitutional provision, respecting the judiciary, must make it co-extensive with the power of legislation, and to associate them inseparably, so that where one went, the other might go along with it. The first part of the article, where the jurisdiction is made to depend upon the nature of the controversy, is employed for this purpose, not to limit and restrain. But it was necessary, for great purposes of public policy, to extend it to other cases, where the jurisdiction is made to depend upon the character of the parties. These are the subject of the remaining part of the article. In that part of it which relates to cases arising under the constitution, laws, and treaties of the Union, there is a redundancy in the language: "ALL cases." The pleonasm is here meant to perform its usual office, to be emphatic. It marks the intention, and affords a principle of construction. The additional terms, "all cases in *law and equity*," also serve to heighten the effect, and to show that nothing of this essential power was to be put to hazard. Surely such a clause must be construed liberally. It is a maxim applicable to the interpretation of a grant of political power, that the authority to create must infer a power effectually to protect, to preserve, and to sustain.[a] It is no less a maxim, that the power to create a faculty of any sort, must infer the power to give it the means of exercise. A grant of the end is necessarily a grant of the means. The constitutional power of Congress to create a Bank, is derived altogether

a M'Culloch v. Maryland, 4 *Wheat. Rep.* 426.

1824.

Osborn v. U. S. Bank.

from the necessity of such an institution, for the fiscal purposes of the Union. It is established, not for the benefit of the stockholders, but for the benefit of the nation. It is part of the fiscal means of the nation. Indeed, "the power of creating a corporation, is never used for its own sake, but for the purpose of effecting something else."[a] The Bank is created for the purpose of facilitating all the fiscal operations of the national government. All its powers and faculties are conferred for this purpose, and for this alone; and it is to be supposed, that no other or greater powers are conferred than are necessary to this end. The collection and administration of the public revenue is, of all others, the most important branch of the public service. It is that which least admits of hindrance or obstruction. The Bank is, in effect, an instrument of the government, and its instrumental character is its *principal* character. That is the end; all the rest are means. It is as much a servant of the government as the treasury department. The two faculties of the Bank, which are essential to its existence and utility, are, its capacity to hold property, and that of suing and being sued. The latter is the necessary sanction and security of the former, and of all the rest. The former must be inviolable, and the latter must be sufficient to secure its inviolability. But it is not so, if Congress cannot erect a forum, to which the Bank may resort for justice. A needful operation of the government becomes dependent upon foreign sup-

a M'Culloch v. Maryland, 4 *Wheat. Rep.* 411.

port, which may be given, but which may also be withheld. There is no unreasonable jealousy of State judicatures; but the constitution itself supposes that they may not always be worthy of confidence, where the rights and interests of the national government are drawn in question. It is indispensable, that the interpretation and application of the laws and treaties of the Union should be uniform. The danger of leaving the administration of the national justice to the local tribunals, is not merely speculative. In Ohio, the Bank has been outlawed; and if it cannot seek redress in the federal tribunals, it can find it no where. Where is the power of coercion in the national government? What is to become of the public revenue while it is going on? Congress might not only have given original, but it might have given exclusive jurisdiction, in the cases mentioned in the 25th section of the Judiciary Act of 1789, c. 20.; instead of which, it has contented itself with giving an appellate jurisdiction, to correct the errors of the State Courts, where a question incidentally arises under the laws and treaties of the Union. But here the question is, whether the government of the United States can execute one of its own laws, through the process of its own Courts. The right of the Bank to sue in the national Courts, is one of its essential faculties. If that can be taken away, it is deprived of a part of its being, as much as if it were stripped of its power of discounting notes, receiving deposits, or dealing in bills of exchange.

1824.

Osborn v. U. S. Bank

Against the jurisdiction, it was said, that by the act incorporating the old Bank of the United

1824.

Osborn v. U. S. Bank.

States, authority is given to the corporation "to sue, &c. in Courts of record, or any other place whatsoever." By the present charter, it is empowered "to sue, &c. in all State Courts having competent jurisdiction, and in any Circuit Court of the United States." No difference is perceived in the legal effect of these two acts. Both give the same privileges. The Circuit Courts of the Union are "Courts of record;" and an authority to sue in Courts of record, or any other place whatsoever, is an authority to sue in the Circuit Courts. So that, if Congress were competent, under the constitution, to vest such a jurisdiction in the federal Courts, it was vested by the first act of incorporation. But in the case of the *Bank of the United States v. Deveaux*,[a] the Court says, that "by the judiciary act, the jurisdiction of the Circuit Courts is extended to cases where the constitutional right to plead and be impleaded in the Courts of the Union, depends on the *character of the parties;* but where that right depends on *the nature of the case*, the Circuit Courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same State claiming lands under grants from different States. Unless, then, jurisdiction over this cause has been given to the Circuit Court, by some other than the Judiciary Act, the Bank of the United States had not a right to sue in that Court, upon the principle that the case arises under a law of the United States." The Court then proceeds to consider,

[a] 7 *Cranch*, 85.

1824.

Osborn v U. S. Bank.

whether jurisdiction had been given to the Circuit Court by the act incorporating the Bank, and determines that it had not. The Judiciary Act, nor no other law of Congress, can extend the jurisdiction of the federal Courts beyond the constitutional limits. The charter attempted to confer jurisdiction on the State Courts, in cases where the Bank is a party. This provision, and that empowering it to sue in the Circuit Courts of the Union, are both equally void. The act must, therefore, be restricted, so as to give the corporation authority to sue and be sued in such Courts only as are competent to take jurisdiction. This Court has determined, that the right of a corporation to litigate in the Courts of the Union, depends upon the character (as to citizenship) of the members which compose the body corporate, and that a corporation, as such, cannot be a citizen, within the meaning of the constitution.[a] There is here no averment on the record, that the plaintiffs have a right to sue, upon the ground of the corporation being citizens of a different State from the defendants; nor could such averment have been made, consistently with the truth of the fact.

It had been said, that every suit brought by the Bank, arises under the laws of the United States, because the Bank, with all its powers and faculties, was created, and existed, by a law of the United States. So it might be said of an alien who is naturalized by the laws of the Union, that

a Hope Insurance Company v. Boardman, 5 *Cranch*, 61.

1824.

Osborn v U. S. Bank.

he derives his citizenship from those laws. But, could Congress, therefore, authorize all naturalized citizens to sue in the Courts of the Union? A clear distinction exists between a party and a cause; the party may originate under a law with which the cause has no connexion. A revenue officer may commit a trespass while executing his official duties, and if he justifies under the statutes of the United States, a question will arise under them, in which an appellate jurisdiction is given to this Court, to correct the errors of the State Courts. But could Congress give additional jurisdiction to the federal Courts, in all suits brought by or against the revenue officers? In *M'Intyre v. Wood*,[a] this Court says, "when questions arise under the constitution of the United States, in the State Courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court; and this provision the Legislature has thought *sufficient at present* for all the political purposes to be answered by the clause of the constitution which relates to the subject." And it may be added, that it must remain sufficient until the law shall be changed by some unequivocal provision within the constitutional competency of Congress to make.

It was also contended, that every right that accrues to the Bank in its corporate character, upon which a suit can be maintained, is to be regarded as arising under the charter, and, consequently, under a law of the United States. But the juris-

[a] 7 *Cranch*, 505.

diction of the federal Courts, if it attach at all, must attach either to the *party* or to the *case*. The party and his rights cannot be so mixed together, as that the legal origin of the first shall give character to the latter. A controversy regarding a promissory note or bill of exchange cannot be said to arise under an act of Congress, because the Bank, which is created by an act of Congress, has purchased the note or bill. Neither the rules of evidence, nor the law of contract, can be regulated by the National Legislature. But, in the case supposed, no question can arise, except under the law of contract and the rules of evidence. No law of Congress is drawn into question, and its correct decision cannot possibly depend upon the construction of such law. The Bank cannot come into the federal Courts as a party suing for a breach of contract or a trespass upon its property; for, neither its character as a party, nor the nature of a controversy, can give the Court jurisdiction. The case does not arise under its charter. It arises under the general or local law of contract, and may be determined without opening the statute book of the United States. The privilege conferred upon the Bank in its charter, to sue in the Circuit Courts, must be limited, not only by the criterion indicated; it must also be limited by the general provisions of the Judiciary Act, regulating the exercise of jurisdiction in the Circuit Courts. It cannot sue upon a *chose in action* assigned to it, unless the jurisdiction would have attached between the original parties; it cannot sue a party in the Circuit Court,

1824. Osborn v. U. S. Bank.

over whom the existing laws give the Supreme Court exclusive jurisdiction. The privilege must be enjoyed, subject to existing laws. As to the legislation of Congress in giving to the Courts of the Union cognizance of criminal offences, that depended on the plain principle, that where a power is granted, all its incidents pass. Congress has power to legislate on various subjects. It is an incident, that they may enforce obedience to the laws they make on those subjects, by punishing offences against them. Thus, for example, the right to punish perjury, and the falsification of judicial records, is essential to the administration of justice. Hence, Congress has assumed the power of punishing those offences, when connected with the proceedings in the Courts of the Union. So, in the case of patents, the grant creates the right; and the power to secure to inventors the exclusive benefit of their discoveries, could not be executed without giving the patentees a right to sue in those Courts.

March 19th Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

At the close of the argument, a point was suggested, of such vital importance, as to induce the Court to request that it might be particularly spoken to. That point is, the right of the Bank to sue in the Courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties.

1824.

Osborn v. U. S. Bank.

The appellants contest the jurisdiction of the Court on two grounds:

1st. That the act of Congress has not given it.

2d. That, under the constitution, Congress cannot give it.

The Circuit Courts have jurisdiction of suits by and against the Bank.

1. The first part of the objection depends entirely on the language of the act. The words are, that the Bank shall be "made able and capable in law," "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."

These words seem to the Court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued," "in every Circuit Court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this Court, in *The Bank of the United States v. Deveaux*, (5 *Cranch*, 85.) In that case it was decided, that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the federal Courts. The words of the 3d section of that act are, that the Bank may "sue and be sued," &c. "in Courts of record, or any other place whatsoever." The Court was of opinion, that these general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the

1824.

Osborn v. U. S. Bank.

Courts of the United States; and this opinion was strengthened by the circumstance that the 9th rule of the 7th section of the same act, subjects the directors, in case of excess in contracting debt, to be sued in their private capacity, "in any Court of record of the United States, or either of them." The express grant of jurisdiction to the federal Courts, in this case, was considered as having some influence on the construction of the general words of the 3d section, which does not mention those Courts. Whether this decision be right or wrong, it amounts only to a declaration, that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those Courts. To infer from this, that words expressly conferring a right to sue in those Courts, do not give the right, is surely a conclusion which the premises do not warrant.

The act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it.

The clause in the charter of the Bank, which authorizes it to sue in the Circuit Courts, is constitutional.

2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the Bank to sue in the federal Courts.

In support of this clause, it is said, that the legislative, executive, and judicial powers, of every well constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law. All govern-

1824.
Osborn v. U. S. Bank.

ments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The 2d article vests the whole executive power in the President; and the 3d article declares, "that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

The suit of *The Bank of the United States v. Osborn and others*, is a case, and the question is, whether it arises under a law of the United States?

The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress.

If this were sufficient to withdraw a case from

1824.

Osborn v. U. S. Bank.

the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the Court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case, the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases, in which original jurisdiction is given to this Court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior Courts is ex-

cluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find, in the constitution, no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say, that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.

The constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate, that in any such case, the power cannot be exercised in its original form by Courts of original jurisdiction. It is not insinuated, that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the Courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some

1824.

Osborn v. U. S. Bank.

of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has

received that shape which may be given to it by another tribunal, into which he is forced against his will. 1824. Osborn v. U. S. Bank.

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the Bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependant on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of a contract, which is put as the strongest against the Bank.

When a Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a

1824.

Osborn v. U. S. Bank.

law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is

1824.

Osborn v. U. S. Bank.

compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

The clause giving the Bank a right to sue in the Circuit Courts of the United States, stands on the same principle with the acts authorizing officers of the United States who sue in their own names, to sue in the Courts of the United States. The Postmaster General, for example, cannot sue under that part of the constitution which gives jurisdiction to the federal Courts, in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act. He comes into the Courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said, that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the Bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends abso-

1824.

Osborn v. U. S. Bank.

lutely on that law, and cannot exist a moment without its authority.

If it be said, that a suit brought by the Bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true, with respect to suits brought by the Postmaster General. The plea in bar may be payment, if the suit be brought on a bond, or non-assumpsit, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the Postmaster General to sue in the Courts of the United States, has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the constitution which asserts the right of the Legislature to give original jurisdiction to the Circuit Courts, in cases arising under a law of the United States.

The clause in the patent law, authorizing suits in the Circuit Courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defence exclusively on the fact, that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the Court, or establish the position, that the case does not arise under a law of the United States.

It is said, that a clear distinction exists between

1824.

Osborn v. U. S. Bank.

the party and the cause; that the party may originate under a law with which the cause has no connexion; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the Courts of the United States, as give that right to the Bank.

This distinction is not denied; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the Bank: It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the Bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the Bank arises out of this law.

A naturalized citizen is indeed made a citizen under an act of Congress. but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.' The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the Courts of the United States, precisely under the same circumstances under which a native might sue. He is

1824. Osborn v. U. S. Bank.

distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.

There is, then, no resemblance between the act incorporating the Bank, and the general naturalization law.

Upon the best consideration we have been able to bestow on this subject, we are of opinion, that the clause in the act of incorporation, enabling the Bank to sue in the Courts of the United States, is consistent with the constitution, and to be obeyed in all Courts.

We will now proceed to consider the merits of the cause.

The appellants contend, that the decree of the Circuit Court is erroneous—

1. Because no authority is shown in the record, from the Bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions, sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill, does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because, the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because, the case made in the bill does not

warrant the interference of a Court of Chancery, by injunction.

6. Because, if any case is made in the bill proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because, the decree assumes that the Bank of the United States is not subject to the taxing power of the State of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

These points will be considered in the order in which they are made.

How far a warrant of attorney, or other authority, must be shown, to enable an attorney or solicitor to prosecute a suit.

1. It is admitted that a corporation can only appear by attorney, and it is also admitted, that the attorney must receive the authority of the corporation to enable him to represent it. It is not admitted that this authority must be under seal. On the contrary, the principle decided in the cases of the *Bank of Columbia v. Patterson*, &c. is supposed to apply to this case, and to show that the seal may be dispensed with. It is, however, unnecessary to pursue this inquiry, since the real question is, whether the non-appearance of the power in the record be error, not whether the power was insufficient in itself.

Natural persons may appear in Court, either by themselves, or by their attorney. But no man has a right to appear as the attorney of another, without the authority of that other. In ordinary cases, the authority must be produced, because there is, in the nature of things, no *prima facie* evidence that one man is in fact the attorney of another.

1824. Osborn v. U. S. Bank.

The case of an attorney at law, an attorney for the purpose of representing another in Court, and prosecuting or defending a suit in his name, is somewhat different. The power must indeed exist, but its production has not been considered as indispensable. Certain gentlemen, first licensed by government, are admitted by order of Court, to stand at the bar, with a general capacity to represent all the suitors in the Court. The appearance of any one of these gentlemen in a cause, has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our Courts, and no departure from it has been made in those of any State, or of the Union.

The argument supposes some distinction, in this particular, between a natural person and a corporation; but the Court can perceive no reason for this distinction. A corporation, it is true, can appear only by attorney, while a natural person may appear for himself. But when he waives this privilege, and elects to appear by attorney, no reason is perceived why the same evidence should not be required, that the individual professing to represent him has authority to do so, which would be required if he were incapable of appearing in person. The universal and familiar practice, then, of permitting gentlemen of the profession to appear without producing a warrant of attorney, forms a rule, which is as applicable in reason to their appearance for a corporation, as for a natural person. Were it even otherwise, the practice is

as uniform and as ancient, with regard to corporations, as to natural persons. No case has ever occurred, so far as we are informed, in which the production of a warrant of attorney has been supposed a necessary preliminary to the appearance of a corporation, either as plaintiff or defendant, by a gentleman admitted to the bar of the Court. The usage, then, is as full authority for the case of a corporation, as of an individual. If this usage ought to be altered, it should be a rule to operate prospectively, not by the reversal of a decree pronounced in conformity with the general course of the Court, in a case in which no doubt of the legality of the appearance had ever been suggested.

In the statutes of jeofails and amendment, which respect this subject, the non-appearance of a warrant of attorney in the record, has generally been treated as matter of form; and the 32d section of the Judiciary Act may very well be construed to comprehend this formal defect in its general terms, in a case of law. No reason is perceived why the Courts of Chancery should be more rigid in exacting the exhibition of a warrant of attorney than a Court of law; and, since the practice has, in fact, been the same in both Courts, an appellate Court ought, we think, to be governed in both by the same rule.

The answer of one defendant, whom evidence against another.

2. The second point is one on which the productiveness of any decree in favour of the plaintiffs most probably depends; for, if the claim be not satisfied with the money found in the possession of Sullivan, it is, at best, uncertain whether

1824.

Osborn v. U. S. Bank.

a fund, out of which it can be satisfied, is to be found elsewhere.

In inquiring whether the proofs or admissions in the cause be sufficient to charge Sullivan, the Court will look into the answer of Currie, as well as into that of Sullivan. In objection to this course, it is said, that the answer of one defendant cannot be read against another. This is generally, but not universally, true. Where ne defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule is not admitted to apply. Thus, if an ancestor die, pending a suit, and the proceedings be revived against his heir, or if a suit be revived against an executor or administrator, the answer of the deceased person, or any other evidence, establishing any fact against him, might be read also against the person who succeeds to him. So, a *pendente lite* purchaser is bound by the decree, without being even made a party to the suit; *a fortiori*, he would, if made a party, be bound by the testimony taken against the vendor.

In this case, if Currie received the money taken out of the Bank, and passed it over to Sullivan, the establishment of this fact, in a suit against Currie, would seem to bind his successor, Sullivan, both as a privy in estate, and as a person getting possession *pendente lite*, if the original suit had been instituted against Currie. We can perceive no difference, so far as respects the answer of Currie, between the case supposed, and the case as it stands. If Currie, who was the predecessor of Sullivan, admits that he received the money of

the Bank, the fact seems to bind all those coming in under him, as completely as it binds himself. This, therefore, appears to the Court to be a case in which, upon principle, the answer of Currie may be read. 1824. Osborn v. U. S. Bank.

His answer states, that on or about the 19th or 20th of September, 1819, the defendant, Harper, delivered to him, in coin and notes, the sum of 98,000 dollars, which he was informed, and believed to be the money levied on the Bank as a tax, in pursuance of the law of the State of Ohio. After consulting counsel on the question, whether he ought to retain this sum within his individual control, or pass it to the credit of the State on the books of the treasury, he adopted the latter course, but retained it carefully in a trunk, separate from the other funds of the treasury. The money afterwards came to the hands of Sullivan, the gentleman who succeeded him as treasurer, and gave him a receipt for all the money in the treasury, including this, which was still kept separate from the rest.

We think no reasonable doubt can be entertained, but that the 98,000 dollars, delivered by Harper to Currie, were taken out of the Bank. Currie understood and believed it to be the fact. When did he so understand and believe it? At the time when he received the money. And from whom did he derive his understanding and belief? The inference is irresistible, that he derived it from his own knowledge of circumstances, for they were of public notoriety, and from the information of Harper. In the necessary course of things, Harper, who was sent, as Currie must have known, on this

1824.
Osborn v. U. S. Bank.

business, brings with him to the treasurer of the State, a sum of money, which, by the law, was to be taken out of the Bank, pays him 98,000 dollars thereof, which the treasurer receives and keeps, as being money taken from the Bank, and so enters it on the books of the treasury. In a suit brought against Mr. Currie for this money, by the State of Ohio, if he had failed to account for it, could any person doubt the competency of the testimony to charge him? We think no mind could hesitate in such a case.

Currie, then, being clearly in possession of this money, and clearly liable for it, we are next to look into Sullivan's answer, for the purpose of inquiring whether he admits any facts which show him to be liable also.

Sullivan denies all personal knowledge of the transaction; that is, he was not in office when it took place, and was not present when the money was taken out of the Bank, or when it was delivered to Currie. But when he entered the treasury office, he received this sum of 98,000 dollars, separate from the other money of the treasury, which, he understood from report, and was informed by his predecessor, from whom he received it, was the money taken out of the Bank. This sum has remained untouched ever since, from respect to the injunction awarded by the Court.

We ask, if a rational doubt can remain on this subject.

Mr. Currie, as treasurer of the State of Ohio, receives 98,000 dollars, as being the amount of a tax imposed by the Legislature of that State on

the Bank of the United States; enters the same on the books of the treasury; and, the legality of the act by which the money was levied being questioned, puts it in a trunk, and keeps it apart from the other money belonging to the public. He resigns his office, and is succeeded by Mr. Sullivan, to whom he delivers the money, informing him, at the same time, that it is the money raised from the Bank; and Mr. Sullivan continues to keep it apart, and abstains from the use of it, out of respect to an injunction, forbidding him to pay it away, or in any manner to dispose of it. Is it possible to doubt the identity of this money?

Even admitting that the answer of Currie, though establishing his liability as to himself, could not prove even that fact as to Sullivan; the answer of Sullivan is itself sufficient, we think, to charge him. He admits that these 98,000 dollars were delivered to him, as being the money which was taken out of the Bank, and that he so received it; for, he says, he understood this sum was the same as charged in the bill; that his information was from report, and from his predecessor; and that the money has remained untouched, from respect to the injunction. This declaration, then, is a part of the fact. The fact, as admitted in his answer, is not simply that he received 98,000 dollars, but that he received 98,000 dollars, as being the money taken out of the Bank—the money to which the writ of injunction applied.

In a common action between two private individuals, such an admission would, at least, be sufficient to throw on the defendant the burthen of

1824. Osborn v. U. S. Bank.

proving that the money, which he acknowledges himself to have received and kept as the money of the plaintiff, was not that which it was declared to be on its delivery. A declaration, accompanying the delivery, and constituting a part of it, gives a character to the transaction, and is not to be placed on the same footing with a declaration made by the same person at a different time. The answer of Sullivan, then, is, in the opinion of the Court, sufficient to show that these 98,000 dollars were the specific dollars for which this suit was brought. This sum having come to his possession with full knowledge of the fact, in a separate trunk, unmixed with money, and with notice that an injunction had been awarded respecting it, he would seem to be responsible to the plaintiff for it, unless he can show sufficient matter to discharge himself.

Responsibility of the parties against whom the bill was taken *pro confesso*.

3. The next objection is, to the decree against Osborn and Harper, as to whom the bill was taken for confessed.

The bill charges, that Osborn employed John L. Harper to collect the tax, who proceeded by violence to enter the office of discount and deposit at Chilicothe, and forcibly took therefrom 100,000 dollars in specie and bank notes; and that, at the time of the seizure, Harper well knew, and was duly notified, that an injunction had been allowed, which money was delivered either to Currie or Osborn.

So far as respects Harper and Osborn, these allegations are to be considered as true. If the act of the Legislature of Ohio, and the official

character of Osborn, constitute a defence, neither of these defendants are liable, and the whole decree is erroneous; but if the act be unconstitutional and void, it can be no justification, and both these defendants are to be considered as individuals who are amenable to the laws. Considering them, for the present, in this character, the fact, as made out in the bill, is, that Osborn employed Harper to do an illegal act, and that Harper has done that act; and that they are jointly responsible for it, is supposed to be as well settled as any principle of law whatever.

1824
Osborn
U. S. Bank.

We think it unnecessary, in this part of the case, to enter into the inquiry respecting the effect of the injunction. No injunction is necessary to attach responsibility on those who conspire to do an illegal act, which this is, if not justified by the authority under which it was done.

4. The next objection is, to the allowance of interest on the coin, which constituted a part of the sum decreed to the complainants. Had the complainants, without the intervention of a Court of equity, resorted to their legal remedy for the injury sustained, their right to principal and interest would have stood on equal ground. The same rule would be adopted in a Court of equity, had the subject been left under the control of the party in possession, while the right was in litigation. But the subject was not left under the control of the party. The Court itself interposed, and forbade the person, in whose possession the property was, to make any use of it. This order having been obeyed, places the defendant in the same

Interest will not be decreed against a party, upon money which he is enjoined from using.

1824.

Osborn v. U. S. Bank

situation, so far as respects interest, as if the Court had taken the money into its own custody. The defendant, in obeying the mandate of the Court, becomes its instrument, as entirely as the Clerk of the Court would have been, had the money been placed in his hands. It does not appear reasonable, that a decree which proceeds upon the idea, that the injunction of the Court was valid, ought to direct interest to be paid on the money which that injunction restrained the defendant from using.

Case made in the bill, proper for an injunction, and other equitable relief.

5. The fifth objection to the decree is, that the case made in the bill does not warrant the interference of a Court of Chancery.

In examining this question, it is proper that the Court should consider the real case, and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, Auditor of the State of Ohio, to restrain him from executing a law of that State, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person, who is a State officer, from performing any official act enjoined by statute; and whether a Court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnishes no authority or protection to the officer who is about to proceed under it. This must be assumed, because, in the arrangement of his argu-

ment, the counsel who opened the cause, has chosen to reserve that point for the last, and to contend that, though the law be void, no case is made out against the defendants. We suspend, also, the consideration of the question, whether the interest of the State of Ohio, as disclosed in the bill, shows a want of jurisdiction in the Circuit Court, which ought to have arrested its proceedings. That question, too, is reserved by the appellants, and will be subsequently considered. The sole inquiry, for the present, is, whether, stripping the case of these objections, the plaintiffs below were entitled to relief in a Court of equity, against the defendants, and to the protection of an injunction. The appellants expressly waive the extravagant proposition, that a void act can afford protection to the person who executes it, and admits the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law. The question, then, is reduced to the single inquiry, whether the case is cognizable in a Court of equity. If it is, the decree must be affirmed, so far as it is supported by the evidence in the cause.

The appellants allege, that the original bill contains no allegation which can justify the application for an injunction, and treat the declarations of Ralph Osborn, the Auditor, that he should execute the law, as the light and frivolous threats of an individual, that he would commit an ordinary trespass. But surely this is not the point of view in which the application for an injunction is to be considered. The Legislature of Ohio had passed

1824.

Osborn v. S. Bank.

a law for the avowed purpose of expelling the Bank from the State; and had made it the duty of the Auditor to execute it as a ministerial officer. He had declared that he would perform this duty. The law, if executed, would unquestionably effect its object, and would deprive the Bank of its chartered privileges, so far as they were to be exercised in that State. It must expel the Bank from the State; and this is, we think, a conclusion which the Court might rightfully draw from the law itself. That the declarations of the Auditor would be fulfilled, did not admit of reasonable doubt. It was to be expected, that a person continuing to hold an office, would perform a duty enjoined by his government, which was completely within his power. This duty was to be repeated until the Bank should abandon the exercise of its chartered rights.

To treat this as a common casual trespass, would be to disregard entirely its true character and substantial merits. The application to the Court was, to interpose its writ of injunction, to protect the Bank, not from the casual trespass of an individual, who might not perform the act he threatened, but from the total destruction of its franchise, of its chartered privileges, so far as respected the State of Ohio. It was morally certain, that the Auditor would proceed to execute the law, and it was morally certain, that the effect must be the expulsion of the Bank from the State. An annual charge of 100,000 dollars, would more than absorb all the advantages of the privilege, and would consequently annul it.

1824.

Osborn v. U. S. Bank.

The appellants admit, that injunctions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such a case as this. But, although the precise case may never have occurred, if the same principle applies, the same remedy ought to be afforded. The interference of the Court in this class of cases, has most frequently been to restrain a person from violating an exclusive privilege, by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the Court rather strengthened than weakened? Had the privilege of the Bank been exclusive, the argument admits that any other person, or company, might have been enjoined, according to the regular course of the Court of Chancery, from using or exercising the same business. Why would such person or company have been enjoined? To prevent a permanent injury from being done to the party entitled to the franchise or privilege; which injury, the appellants say, cannot be estimated in damages. It requires no argument to prove, that the injury is greater, if the whole privilege be destroyed, than if it be divided; and, so far as respects the estimate of damages, although precise accuracy may not be attained, yet a reasonable calculation may be made of the amount of the injury, so as to satisfy the Court and Jury. It will not be pretended, that, in such a case, an action at law could not be maintained, or that the materials do not exist on which a verdict might be

1824.

Osborn v. U. S. Bank.

found, and a judgment rendered. But in this, and many other cases of continuing injuries, as in the case of repeated ejectments, a Court of Chancery will interpose. The injury done, by denying to the Bank the exercise of its franchise in the State of Ohio, is as difficult to calculate, as the injury done by participating in an exclusive privilege. The single act of levying the tax in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in Chancery, which prevents its repetition, and protects the privilege. The same conservative principle, which induces the Court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and in many cases of destruction, will, we think, apply to this. Indeed, trespass is destruction, where there is no privity of estate.

If the State of Ohio could have been made a party defendant, it can scarcely be denied, that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the Court, a suit cannot be sustained against the agents of that party; and cases have been cited, to show that a Court of Chancery will not make a decree, unless all those who are substantially interested, be made parties to the suit.

This is certainly true, where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself

above the law, be exempt from all judicial process, it would be subversive of the best established principles, to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. It is admitted, that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connexion with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the Court also be applied to him? Why may it not restrain him from the commission of a wrong, which it would punish him for committing? We put out of view the character of the principal as a sovereign State, because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the Court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the Court? The appellants found their distinction on the legal principle, that all trespasses are several as well as joint, without inquiry into the validity of this reason, if true. We ask, if it be true? Will it be said, that the action of trespass is the only remedy given for this injury? Can it be denied, that an action on the case, for money had and received to the plaintiff's use, might be maintained?

1824.
Osborn v. U. S. Bank.

We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us, for the opinion, that an injunction may not be awarded to restrain the agent, with as much propriety as it might be awarded to restrain the principal, could the principal be made a party.

We think the reason for an injunction is much stronger in the actual, than it would be in the supposed case. In the regular course of things, the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury, would be against the agent only; and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a Court of equity The injury would, in fact, be irreparable; and the cases are innumerable, in which injunctions are awarded on this ground.

But, were it even to be admitted, that the injunction, in the first instance, was improperly awarded, and that the original bill could not be maintained, that would not, we think, materially affect the case. An amended and supplemental bill, making new parties, has been filed in the cause, and on that bill, with the proceedings under it, the decree was pronounced. The question is, whether that bill and those proceedings support the decree.

The case they make, is, that the money and

notes of the plaintiffs, in the Circuit Court, have been taken from them without authority, and are in possession of one of the defendants, who keeps them separate and apart from all other money and notes. It is admitted, that this defendant would be liable for the whole amount in an action at law; but it is denied that he is liable in a Court of equity.

1824.

Usborn v. U. S. Bank.

We think it a case in which a Court of equity ought to interpose, and that there are several grounds on which its jurisdiction may be placed.

One, which appears to be ample for the purpose, is, that a Court will always interpose, to prevent the transfer of a specific article, which, if transferred, will be lost to the owner. Thus, the holder of negotiable securities, indorsed in the usual manner, if he has acquired them fraudulently, will be enjoined from negotiating them; because if negotiated, the maker or indorser must pay them. Thus, too, a transfer of stock will be restrained in favour of a person having the real property in the article. In these cases, the injured party would have his remedy at law; and the probability that this remedy would be adequate, is stronger in the cases put in the books, than in this, where the sum is so greatly beyond the capacity of an ordinary agent to pay. But it is the province of a Court of equity, in such cases, to arrest the injury, and prevent the wrong. The remedy is more beneficial and complete, than the law can give. The money of the Bank, if mingled with the other mo-

[a] 1 *Mad.* 154, 155.

1824.

Osborn v. U. S. Bank.

ney in the treasury, and put into circulation, would be totally lost to the owners; and the reason for an injunction is, at least, as strong in such a case, as in the case of a negotiable note.

The exemption of the State from suability, no objection to the proceedings against its officers, for executing an unconstitutional law.

6. We proceed now to the 6th point made by the appellants, which is, that if any case is made in the bill, proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

The bill is brought, it is said, for the purpose of protecting the Bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts a right to invade, and is about to invade. It prays the aid of the Court to restrain the officers of the State from executing the law. It is, then, a controversy between the Bank and the State of Ohio. The interest of the State is direct and immediate, not consequential. The process of the Court, though not directed against the State by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form, against the State, and the Court ought not to proceed without making the State a party. If this cannot be done, the Court cannot take jurisdiction of the cause.

The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the

State was before the Court. But this was not in the power of the Bank. The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens; and the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the State, and on the property in their hands.

1824.

Osborn v. U. S. Bank.

Before we try this question by the constitution, it may not be time misapplied, if we pause for a moment, and reflect on the relative situation of the Union with its members, should the objection prevail.

A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains, that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own Courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous

1824.

Osborn v. U. S. Bank.

penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armour, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the Bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty, than by the infliction of this penalty on a Bank, which, while carrying on the fiscal operations of the government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power

to restrain him is denied as positively in the one as in the other.

The distinction between any extreme case, and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears, when considering the question of jurisdiction; for, if the Courts of the United States cannot rightfully protect the agents who execute every law authorized by the constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law.

The question, then, is, whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws.

The State of Ohio denies the existence of this power, and contends, that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent; of a State, can be sustained against such agent, because they would be substantially against the State itself, in violation of the 11th amendment of the constitution.

That the Courts of the Union cannot entertain a suit brought against a State by an alien, or the citizen of another State, is not to be controverted. Is a suit, brought against an individual, for any cause whatever, a suit against a State, in the sense of the constitution?

1824.

Osborn v. U. S. Bank.

The 11th amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

The words of the constitution, so far as they respect this question, are, "The judicial power shall extend to controversies between two or more States, between a State and citizens of another State, and between a State and foreign states, citizens, or subjects."

A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which "a State shall be a party."

The words of the 11th amendment are, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of a foreign state."

The Bank of the United States contends, that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

The appellants admit, that the jurisdiction of the Court is not ousted by any incidental or consequential interest, which a State may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the State, through its officers.

1824.

Osborn v. U. S. Bank.

If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced, where any person has been considered as a party, who is not made so in the record. But the Court will not review those decisions, because it is thought a question growing out of the constitution of the United States, requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the Courts of any other country.

Do the provisions, then, of the American constitution, respecting controversies to which a State may be a party, extend, on a fair construction of that instrument, to cases in which the State is not a party on the record?

The first in the enumeration, is a controversy between two or more States.

There are not many questions in which a State would be supposed to take a deeper or more immediate interest, than in those which decide on the extent of her territory. Yet the constitution, not considering the State as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different States. If each State, in consequence of the influence of a decision on her boundary, had been considered, by the framers of the constitution, as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves, that the constitu-

1824.

Osborn v. U. S. Bank.

tion does not consider the State as a party in such a case.

Jurisdiction is expressly granted, in those cases only where citizens of the same State claim lands under grants of different States. If the claimants be citizens of different States, the Court takes jurisdiction for that reason. Still, the right of the State to grant, is the essential point in dispute; and in that point the State is deeply interested. If that interest converts the State into a party, there is an end of the cause; and the constitution will be construed to forbid the Circuit Courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same State.

We are aware, that the application of these cases may be denied, because the title of the State comes on incidentally; and the appellants admit the jurisdiction of the Court, where its judgment does not act directly upon the property or interests of the State; but we deemed it of some importance to show, that the framers of the constitution contemplated the distinction between cases in which a State was interested, and those in which it was a party, and made no provision for a case of interest, without being a party on the record.

In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the State, what rule has the constitution given, by which this interest

is to be measured? If no rule be given, is it to be settled by the Court? If so, the curious anomaly is presented, of a Court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

The next in the enumeration, is a controversy between a State and the citizens of another State.

Can this case arise, if the State be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New-York and New-Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the federal Court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted, that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the State against him, may plead in bar the judgment of a Court of

1824.

Osborn v. U. S. Bank.

competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State, in the hands of its officer. And yet the argument admits, that the action, in such a case, would be sustained. But, suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

It would be tedious to pursue this part of the inquiry farther, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a State may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But, before we review them, we will notice one where the nature of the controversy is, in some degree, blended with the character of the party.

If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his se-

cretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the Court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This Court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is, "controversies to which the United States shall be a party."

Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

Let us examine this question.

Suits brought by the Postmaster-General are

1824.

Osborn v. U. S. Bank.

for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet, these suits could not be instituted in the Courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the Court jurisdiction over them, as being cases arising under a law of the United States.

The judicial power of the Union is also extended to controversies between citizens of different States; and it has been decided, that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another State, the jurisdiction of the federal Courts could be ousted by the fact, that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined, in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted, that this interest in

no manner affects the jurisdiction of the Court? The plain and obvious answer is, because the jurisdiction of the Court depends, not upon this interest, but upon the actual party on the record.

1824.
Osborn
v.
U. S. Bank.

Were a State to be the sole legatee, it will not, we presume, be alleged, that the jurisdiction of the Court, in a suit against the executor, would be more affected by this fact, than by the fact that any other person, not suable in the Courts of the Union, was the sole legatee. Yet, in such a case, the Court would decide directly and immediately on the interest of the State.

This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the 2d section of the 3d article, the Supreme Court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the constitution be construed as it

1824. would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.

Osborn v. U. S. Bank.

The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the officers of the State for the money taken out of the Bank, was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is, to its being enforced against the specific article taken, and by the decree of this Court. But, it has been shown, we think, that an action of detinue might be maintained for that article, if the Bank had possessed the means of describing it, and that the interest of the State would not have been an obstacle to the suit of the Bank against the individual in possession of it. The judgment in such a suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown, that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a Court of equity. It was in a

Court of equity alone that the relief would be real, substantial, and effective. The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and, if denied, could be demonstrated.

It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.

7. Is that law unconstitutional?

The decision of the Court in *M'Culloch* v. *Maryland*, reviewed and confirmed.

This point was argued with great ability, and decided by this Court, after mature and deliberate consideration, in the case of *M'Culloch v. The State of Maryland.* A revision of that opinion has been requested; and many considerations combine to induce a review of it.

The foundation of the argument in favour of the right of a State to tax the Bank, is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being

1824.

Osborn v. U. S. Bank.

employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connexion with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the Court, in the case of *M'Culloch v. The State of Maryland*, is founded on, and sustained by, the idea that the Bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavour to distinguish between this trade and its

agency for the public, between its Banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, &c. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

If there be any thing in this distinction, it would tend to show that so much of the act as incorporates the Bank is constitutional, but so much of it as authorizes its Banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that Congress can incorporate or create a Bank? This question was answered in the case of *M'Culloch v. The State of Maryland.* It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject,

1824. Osborn v. U. S. Bank.

the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle, with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a Bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence. To tax its faculties, its trade, and occupation, is to tax the Bank itself? To destroy or preserve the one, is to destroy or preserve the other.

It is urged, that Congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be carried on by a private individual, or company, as well as by a corporation. As this profession or business may be taxed, regulated, or restrained, when conducted by an individual, it may, likewise, be taxed, regulated, or restrained, when conducted by a corporation.

The general correctness of these propositions need not be controverted. Their particular application to the question before the Court, is alone to be considered. We do not maintain that the corporate character of the Bank exempts its operations from the action of State authority. If an individual were to be endowed with the same fa-

culties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the Bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the Bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

1824.
Osborn v. U. S. Bank.

Were the Secretary of the Treasury to be authorized, by law, to appoint agencies throughout the Union, to perform the public functions of the Bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the Bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labour, and expense, the profits of the banking business, instead of other emoluments, to be drawn from the treasury, which banking business was essential to the operations of the government, would each State in the Union possess a right to

1824.

Osborn v. U. S. Bank.

control these operations? The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist? must always be answered in the affirmative.

Congress was of opinion that these faculties were necessary, to enable the Bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national Legislature. But, were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the government, is too obvious for controversy; and who will venture to affirm, that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government, than it could otherwise be; and, if this be true, the capacity to carry on this trade, is a faculty indispensable to the character and objects of the institution.

The appellants admit, that, if this faculty be necessary, to make the Bank a fit instrument for the purposes of the government, Congress possesses the same power to protect the machine in

this, as in its direct fiscal operations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are drawn from it might follow. But it is not admitted. The Court has already stated its conviction, that without this capacity to trade with individuals, the Bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests.

1824.

Osborn v. U. S. Bank.

It is contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the Court.

It is not unusual, for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control, which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted, that all who are employed in them, are protected, while in the line of duty; and yet this protection is not expressed in any act of Congress. It is in-

1824. Osborn v. U. S. Bank.

cidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.

That department has no will, in any case. If the sound construction of the act be, that it exempts the trade of the Bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the States, Courts are as much bound to give it that construction, as if the exemption had been established in express terms. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

The appellants rely greatly on the distinction between the Bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government, and are excluded from a seat in Congress. Not so the directors of the Bank. The connexion of the government with the Bank, is likened to that with contractors.

It will not be contended, that the directors, or

other officers of the Bank, are officers of government. But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the State to control its operations, if those operations be necessary to its character, as a machine employed by the government, cannot be maintained. Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the Bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control.

If the trade of the Bank be essential to its character, as a machine for the fiscal operations of the government, that trade must be as exempt from State control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the money of the nation, as on that of discounting the notes of individuals. No distinction is taken between them.

Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation, which was necessary, to make it a fit instrument for the objects for which it was created, the Court adheres to its decision in the case of *M'Culloch* against *The State*

1824.

Osborn v. U. S. Bank.

of Maryland, and is of opinion, that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void. The counsel for the appellants are too intelligent, and have too much self respect, to pretend, that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.

It being then shown, we think conclusively, that the defendants could derive neither authority nor protection from the act which they executed, and that this suit is not against the State of Ohio within the view of the constitution, the State being no party on the record, the only real question in the cause is, whether the record contains sufficient matter to justify the Court in pronouncing a decree against the defendants? That this question is attended with great difficulty, has not been concealed or denied. But when we reflect that the defendants, Osborne and Harper, are incontestably liable for the full amount of the money taken out of the Bank; that the defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the property of the Bank, unless the form of having made an entry on the books of the treasury can countervail the fact, that it was, in truth, kept untouched, in a trunk, by itself, as a deposit, to await

1824.

Osborn v. U. S. Bank.

the event of the pending suit respecting it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money, having reached the hands of all those to whom it afterwards came with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury, nor put into circulation. Were it to be admitted, that the original injunction was not properly awarded, still the amended and supplemental bill, which brings before the Court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the Bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrong doer, in a specific form; so that detinue might have been maintained for it, had it been in the power of the Bank to prove the facts which are necessary to establish the identity of the property sued for. Under such circumstances, we think, a Court of equity may afford its aid, on the ground that a discovery is necessary, and also on the same principle that an injunction issues to restrain a person who has fraudulently obtained possession of negotiable notes, from putting them into circulation; or a person having the apparent ownership of stock really belonging to another, from transferring it. The suit, then, might be as well sustained in a

1824.

Osborn v. U. S. Bank.

Court of equity as in a Court of law, and the objection that the interests of the State are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued—of sovereignty. The interests of the United States are sometimes committed to subordinate agents. It was the case in *Hoyt v. Gelston*, in the case of *The Apollon*, and in the case of *Doddridge's Lessee v. Thompson and Wright*, and in many others. An independent foreign sovereign cannot be sued, and does not appear in Court. But a friend of the Court comes in, and, by suggestion, gives it to understand, that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The Court must proceed to investigate the assertion, and examine the title. In the case at bar, the tribunal established by the constitution, for the purpose of deciding, ultimately, in all cases of this description, had solemnly determined, that a State law imposing a tax on the Bank of the United States, was unconstitutional and void, before the wrong was committed for which this suit was brought.

We think, then, that there is no error in the de-

cree of the Circuit Court for the district of Ohio, so far as it directs restitution of the specific sum of 98,000 dollars, which was taken out of the Bank unlawfully, and was in the possession of the defendant, Samuel Sullivan, when the injunction was awarded, in September, 1820, to restrain him from paying it away, or in any manner using it; and so far as it directs the payment of the remaining sum of 2000 dollars, by the defendants, Ralph Osborne and John L. Harper; but that the same is erroneous, so far as respects the interest on the coin, part of the said 98,000 dollars, it being the opinion of this Court, that, while the parties were restrained by the authority of the Circuit Court from using it, they ought not to be charged with interest. The decree of the Circuit Court for the district of Ohio is affirmed, as to the said sums of 98,000 dollars, and 2000 dollars; and reversed, as to the residue.

1824.

Osborn v. U. S. Bank.

Mr. Justice JOHNSON. The argument in this cause presents three questions: 1. Has Congress granted to the Bank of the United States, an unlimited right of suing in the Courts of the United States? 2. Could Congress constitutionally grant such a right? and 3. Has the power of the Court been legally and constitutionally exercised in this suit?

I have very little doubt that the public mind will be easily reconciled to the decision of the Court here rendered; for, whether necessary or unnecessary originally, a state of things has now grown up, in some of the States, which renders all

1824.

Osborn v. U. S. Bank.

the protection necessary, that the general government can give to this Bank. The policy of the decision is obvious, that is, if the Bank is to be sustained; and few will bestow upon its legal correctness, the reflection, that it is necessary to test it by the constitution and laws, under which it is rendered.

The Bank of the United States, is now identified with the administration of the national government. It is an immense machine, economically and beneficially applied to the fiscal transactions of the nation. Attempts have been made to dispense with it, and they have failed; serious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned; and it is now become the functionary that collects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury; and all this, not only without expense to the government, but after paying a large bonus, and sustaining actual annual losses to a large amount; furnishing the only possible means of embodying the most ample security for so immense a charge.

Had its effects, however, and the views of its framers, been confined exclusively to its fiscal uses, it is more than probable that this suit, and the laws in which it originated, would never have had existence. But it is well known, that with that object was combined another, of a very general, and not less important character.

The expiration of the charter of the former Bank, led to State creations of Banks; each new Bank in-

creased the facilities of creating others; and the necessities of the general government, both to make use of the State Banks for their deposits, and to borrow largely of all who would lend to them, produced that rage for multiplying Banks, which, aided by the emoluments derived to the States in their creation, and the many individual incentives which they developed, soon inundated the country with a new description of bills of credit, against which it was obvious that the provisions of the constitution opposed no adequate inhibition.

A specie-paying Bank, with an overwhelming capital, and the whole aid of the government deposits, presented the only resource to which the government could resort, to restore that power over the currency of the country, which the framers of the constitution evidently intended to give to Congress alone. But this necessarily involved a restraint upon individual cupidity, and the exercise of State power; and, in the nature of things, it was hardly possible for the mighty effort necessary to put down an evil spread so wide, and arrived to such maturity, to be made without embodying against it an immense moneyed combination, which could not fail of making its influence to be felt, wherever its claimances could reach, or its industry and wealth be brought to operate.

I believe, that the good sense of a people, who know that they govern themselves, and feel that they have no interests distinct from those of their government, would readily concede to the Bank, thus circumstanced, some, if not all the rights here

1824.

Osborn v. U. S. Bank.

contended for. But I cannot persuade myself, that they have been conceded in the extent which this decision affirms. Whatever might be proper to be done by an amendment of the constitution, this Court is only, at present, expounding its existing provisions.

In the present instance, I cannot persuade myself, that the constitution sanctions the vesting of the right of action in this Bank, in cases in which the privilege is exclusively personal, or in any case, merely on the ground that a question might *possibly* be raised in it, involving the constitution, or constitutionality of a law, of the United States.

When laws were heretofore passed for raising a revenue by a duty on stamped paper, the tax was quietly acquiesced in, notwithstanding it entrenched so closely on the unquestionable power of the States over the law of contracts; but had the same law which declared void contracts not written upon stamped paper, declared, that every person holding such paper should be entitled to bring his action "in any Circuit Court" of the United States, it is confidently believed that there could have been but one opinion on the constitutionality of such a provision. The whole jurisdiction over contracts, might thus have been taken from the State Courts, and conferred upon those of the United States. Nor would the evil have rested there; by a similar exercise of power, imposing a stamp on deeds generally, jurisdiction over the territory of the State, whoever might be parties, even between citizens of the same State—jurisdiction of suits instituted for the recovery of legacies

or distributive portions of intestates' estates—jurisdiction, in fact, over almost every possible case, might be transferred to the Courts of the United States. Wills may be required to be executed on stamped paper; taxes may be, and have been, imposed upon legacies and distributions; and, in all such cases, there is not only a possibility, but a probability, that a question may arise, involving the constitutionality, construction, &c. of a law of the United States. If the circumstance, that the questions which the case involves, are to determine its character, whether those questions be made in the case or not, then every case here alluded to, may as well be transferred to the jurisdiction of the United States, as those to which this Bank is a party. But still farther, as was justly insisted in argument, there is not a tract of land in the United States, acquired under laws of the United States, whatever be the number of mesne transfers that it may have undergone, over which the jurisdiction of the Courts of the United States might not be extended by Congress, upon the very principle on which the right of suit in this Bank is here maintained. Nor is the case of the alien, put in argument, at all inapplicable. The one acquires its character of individual property, as the other does his political existence, under a law of the United States; and there is not a suit which may be instituted to recover the one, nor an action of ejectment to be brought by the other, in which a right acquired under a law of the United States, does not lie as essentially at the basis of the right of action, as in the suits brought by this Bank.

1824. Osborn v. U. S. Bank.

It is no answer to the argument, to say, that the law of the United States is but ancillary to the constitution, as to the alien; for the constitution could do nothing for him without the law: and, whether the question be upon law or constitution, still if the possibility of its arising be a sufficient circumstance to bring it within the jurisdiction of the United States Courts, that possibility exists with regard to every suit affected by alien disabilities; to real actions in time of peace—to all actions in time of war.

I cannot persuade myself, then, that, with these palpable consequences in view, Congress ever could have intended to vest in the Bank of the United States, the right of suit to the extent here claimed. And, notwithstanding the confidence with which this point has been argued, an examination of the terms of the act, and a consideration of them with a view to the context, will be found to leave it by no means a clear case, that such is the legal meaning of the act of incorporation. To be sure, if the act had simply and substantively given the right "to sue and be sued in the Circuit Courts of the United States," there could have been no question made upon the construction of those words. But such is not the fact. The words are, not that the Bank shall be made able and capable in law, to sue, &c., but that it shall, "by a certain name," be made able and capable in law to do the various acts therein enumerated. And these words, under the force of which this suit is instituted, are found in the ordinary incorporating clause of this act, a clause

1824.

Osborn v. U. S. Bank.

which is well understood to be, and which this Court, in the case of *Deveaux*, has recognised to be, littl e more than the mere common place or formula of suc h an act. The name of a corporation is the symbol of its personal existence; a misnomer there is fatal to a suit, (and still more fatal as to other transactions.) By the incorporating clause, a name is given it, and, with that name, a place among created beings; then usually follows an enumeration of the ordinary acts in which it may personate a natural man; and among those acts, the right to sue and be sued, of which the Court, in *Deveaux's* case, very correctly remarks, that it is "a power which if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular Court, but to give a capacity to the corporation to appear as a corporation in any Court which would by law have cognizance of the cause if brought by individuals." With this qualification, the clause in question will be construed, as an enumeration of incidents, instead of a string of enactments; and such a construction is strongly countenanced by the concluding sentence of the section; for, after running through the whole routine of powers, most of which are unquestionably incidental, and needed no enactment to vest them, it concludes thus: "and generally to do and execute all and singular the acts, matters, and things, which to them it shall and may appertain to do." And, in going over the act, it will be found, that whenever it is contemplated to vest a power not incidental, it is done by a specific provision, made

1824. Osborn v. U. S. Bank.

the subject of a distinct clause; such is that power to transact the business of the loan-office of the United States. And, indeed, there is one section of the act, which strikingly exhibits the light in which the law-makers considered the incorporating clause. I mean the tenth; which, notwithstanding that the same clause in the seventh section, which is supposed to confer this sweeping power *to sue*, confers also, in terms equally comprehensive, the power to make laws for the institution, and "to do and execute all and singular the matters and things, which to them it shall and may appertain to do," contains an enactment in the following words: "that they shall have power to appoint such officers, clerks, and servants, under them, for executing the business of the corporation, and to allow them such compensation for their services respectively, as shall be reasonable; and shall be capable of exercising such other powers and authorities for the well governing and ordering the officers of the said corporation, as shall be prescribed by the laws, regulations, and ordinances, of the same;" a section which would have been altogether unnecessary, had the seventh section been considered as enacting, instead of enumerating and limiting. I consider the incorporating clause, then, not as purporting the absolute investment of any power, but as the usual and formal declaration of the extent to which this artificial should personate the natural person, in the transactions incident to ordinary life, or to the peculiar objects of its creation; and, therefore, not vesting the right to sue in the Courts of the United

States, but only the right of personating the natural man in the Courts of the United States, as it might, upon general principles, in any other Courts of competent jurisdiction. And this, I say, is consonant to the decision in *Deveaux's* case, and sustained by abundant evidence on the face of the act itself. Indeed, any other view of the effect of the section, converts some of its provisions into absolute nonsense.

It has been argued, and I have no objection to admit, that the phraseology of this act has been varied from that incorporating the former Bank, with a view to meet the decision in *Deveaux's* case. But it is perfectly obvious, that in the prosecution of that design, the purport of *Deveaux's* case has been misapprehended. The Court there decide, that the jurisdiction of the United States depended, (1.) on the character of the cause, (2.) on the character of the parties; that the Judiciary Act confined the jurisdiction of the Circuit Courts to the second class of cases, and the incorporating act contained no words that purported to carry it further. Whether the legislative power of the United States could extend it as far as is here insisted on, or what words would be adequate to that purpose, the case neither called on the Court to decide, nor has it proposed to decide. If any thing is to be inferred from that decision on those points, it is unfavourable to the sufficiency of the words inserted in the present act. For, the argument of the Court intimates, that where the Legislature propose to give jurisdiction to the Courts of the United States, they do

1824.
Osborn v. U. S. Bank.

it by a separate provision, as in the case of the action of debt for exceeding the sum authorized to be loaned. And on the words of the incorporating section, it makes this remark, "that it is not understood to enlarge the jurisdiction of any particular Court, but to give a capacity to the corporation to appear as a corporation in any Court, which would by law have cognizance of the cause if brought by individuals. If jurisdiction is given by this clause to the federal Courts, it is equally given to all Courts having original jurisdiction, and for all sums, however small they be." Now, the difference of phraseology between the former act and the present, in the clause in question, is this: the former has these words, "may sue and be sued, &c. in Courts of record or any other place whatsoever;" the present act has substituted these words, "in all State Courts having competent jurisdiction, and in any Circuit Court of the United States." Now, the defect here could not have been the want of adequate words, had the intent appeared to have been, to enlarge the jurisdiction of any particular Court. For, if the Circuit Courts were *Courts of record*, the right of suit given was as full as any other words could have made it. But, as the Court in its own words assigns the ground of its decision, the clause could not have been intended to enlarge the jurisdiction of the State Courts, and therefore could not have been intended to enlarge that of the federal Courts, much less to have extended it to the smallest sum possible. Therefore it concludes, that the clause is one of mere enumeration, con-

taining, as it expresses it, "the powers which, if not incident to a corporation, are conferred by every incorporating act, and are not understood to enlarge," &c. If, then, this variation had in view the object which is attributed to it, the words intended to answer that object have been inserted so unhappily as to neutralize its influence; but, I think it much more consistent with the respect due to the draftsman, who was known to have been an able lawyer, to believe that, with such an object in view, he would have pursued a much more plain and obvious course, and given it a distinct and unequivocal section to itself, or at least have worded it with more marked attention. This opinion is further supported, by considering the absurdities that a contrary opinion would lead to.

1824.

Osborn v. U. S. Bank.

A literal translation of the words in question is impossible. Nothing but inconsistencies present themselves, if we attempt to apply it without a reference to the laws and constitution of the United States, forming together the judicial system of the Union. The words are, "may sue and be sued, &c., in any State Court having competent jurisdiction, and in any Circuit Court of the United States." But why should one member of the passage be entitled to an enacting effect, and not the residue? Yet, who will impute to the Legislature or the draftsman, and intention to vest a jurisdiction by these words in a State Court? I do not speak of the positive effect; since the failure of one enactment, because of a want either of power to give or capacity to receive, will not con-

1824.

Osborn v. U. S. Bank.

trol the effect as to any other enactment. I speak of the intent or understanding of the law-maker; who must have used these words, as applicable to the State Courts, in an enacting sense, if we suppose him to have used them in that sense, as to the Courts of the United States. Yet I should be very unwilling to impute to him, or to the Legislature of the country, ignorance of the fact, that such an enactment, if it was one, could not give a right to sue in the State Courts, if the right did not exist without it. Or, in fact, that such enactment was altogether unnecessary, if the legislative power, which must give effect to such an enactment, was adequate to constitute effectually this body corporate.

But why should this supposed enactment go still farther, and confer the capacity to be sued, as well as to sue, either in the Courts of the one jurisdiction or the other? Did the lawgivers suppose that this corporation would not be subject to suit, without an express enactment for that purpose also? Or was it guilty of the more unaccountable mistake, of supposing that it could confer upon individuals, indiscriminately, this privilege of bringing suits in the Courts of the Unitsd States against the Bank? that too, for a cause of action originating, say, in work and labour, or in a special action on the case, or perhaps, ejectment to try title to land mortgaged by a person not having the estate in him, or purchased of a tortious holder for a banking house? I cannot acquiesce in the supposition; and yet, if one is an enactment, and

takes effect as such, they are all enactments, for they are uttered *eodem flatu.* 1824.

Osborn v. U. S. Bank.

My own conclusion is, that none of them are enactments, but all merely declaratory; or, at most, only enacting, in the words of the Court, in the case of *Deveaux*, that the Bank may, by its corporate name and metaphysical existence, bring suit, or personate the natural man, in the Courts specified, as though it were in fact a natural person; that is, in those cases in which, according to existing laws, suits may be brought in the Courts specified respectively.

Indeed, a more unrestricted sense given to the words of the act, could not be carried into execution; a literal exercise of the right of suit, supposed to be granted, would be impossible. Can the Bank of the United States be sued (in the literal language of the act) "in any Circuit Court of the United States?" in that of Ohio, or Louisiana, for instance? Locality, in this respect, cannot be denied to such an institution; or, at least, it is only incidentally, by distress infinite, or attachment, for instance, that such a suit could be maintained. Nor, on the other hand, could the Bank sue literally in any Circuit Court of the United States. It must, of necessity, be confined to the Circuit Court of that district in which the defendant resides, or is to be found. And thus, at last, we circumscribe these general words, by reference to the judicial system of the United States, as it existed at the time. And why the same restriction should not have been imposed, as to amount, which is imposed as to all other suitors,

1824. to wit, 500 dollars and upwards, is to me inscrutable, except on the supposition that this clause was not intended for any other purpose than that which I have supposed. The United States have suffered no other suitors to institute a suit in its Courts for less than that sum, and it is hard to conceive why the Bank should be permitted to institute a suit to recover, if it will, a single cent. This consideration is expressly drawn into notice by this Court, in the case of *Deveaux*, and if it was entitled to weight then, in fixing the construction of the incorporating section, I see no reason why it should be unnoticed now.

O'Neal sbo U. S. Bank.

I will dwell no longer on a point, which is in fact secondary and subordinate; for if Congress can vest this jurisdiction, and the people will it, the act may be amended, and the jurisdiction vested. I next proceed to consider, more distinctly, the constitutional question, on the right to vest the jurisdiction to the extent here contended for.

And here I must observe, that I altogether misunderstood the counsel, who argued the cause for the plaintiff in error, if any of them contended against the jurisdiction, on the ground that the cause involved questions depending on general principles. No one can question, that the Court which has jurisdiction of the principal question, must exercise jurisdiction over every question. Neither did I understand them as denying, that if Congress could confer on the Circuit Courts appellate, they could confer original jurisdiction. The argument went to deny the right to assume jurisdiction on a mere hypothesis. It was one of

description, identity, definition; they contended, that until a question involving the construction or administration of the laws of the United States did actually arise, the *casus federis* was not presented, on which the constitution authorized the government to take to itself the jurisdiction of the cause. That until such a question actually arose, until such a case was actually presented, *non constat,* but the cause depended upon general principles, exclusively cognizable in the State Courts; that neither the letter nor the spirit of the constitution sanctioned the assumption of jurisdiction on the part of the United States at any previous stage.

And this doctrine has my hearty concurrence in its general application. A very simple case may be stated, to illustrate its bearing on the question of jurisdiction between the two governments. By virtue of treaties with Great Britain, aliens holding lands were exempted from alien disabilities, and made capable of holding, aliening, and transmitting their estates, in common with natives. But why should the claimants of such lands, to all eternity, be vested with the privilege of bringing an original suit in the Courts of the United States? It is true, a question might be made, upon the effect of the treaty, on the rights claimed by or through the alien; but until that question does arise, nay, until a decision against the right takes place, what end has the United States to subserve in claiming jurisdiction of the cause? Such is the present law of the United States, as to all but this one distinguished party; and that law was

1824. passed when the doctrines, the views, and ends of the constitution, were, at least, as well understood as they are at present. I attach much importance to the 25th section of the judiciary act, not only as a measure of policy, but as a cotemporaneous exposition of the constitution on this subject; as an exposition of *the words* of the constitution, deduced from a knowledge of its views and policy. The object was, to secure a uniform construction and a steady execution of the laws of the Union. Except as far as this purpose might require, the general government had no interest in stripping the State Courts of their jurisdiction; their policy would rather lead to avoid incumbering themselves with it. Why then should it be vested with jurisdiction in a thousand cases, on a mere possibility of a question arising, which question, at last, does not occur in one of them? Indeed, I cannot perceive how such a reach of jurisdiction can be asserted, without changing the reading of the constitution on this subject altogether. The judicial power extends only to "cases arising," that is, actual, not potential cases. The framers of the constitution knew better, than to trust such a *quo minus* fiction in the hands of any government.

Osborn v. U. S. Bank.

I have never understood any one to question the right of Congress to vest original jurisdiction in its inferior Courts, in cases coming properly within the description of "cases arising under the laws of the United States;" but surely it must first be ascertained, in some proper mode, that the cases are such as the constitution describes. By possibility, a constitutional question may be raised in

any conceivable suit that may be instituted; but that would be a very insufficient ground for assuming universal jurisdiction; and yet, that a question has been made, as that, for instance, on the Bank charter, and may again be made, seems still worse, as a ground for extending jurisdiction. For, the folly of raising it again in every suit instituted by the Bank, is too great, to suppose it possible. Yet this supposition, and this alone, would seem to justify vesting the Bank with an unlimited right to sue in the federal Courts. Indeed, I cannot perceive how, with ordinary correctness, a question can be said to be involved in a cause, which only may possibly be made, but which, in fact, is the very last question that there is any probability will be made; or rather, how that can any longer be denominated a question, which has been put out of existence by a solemn decision. The constitution presumes, that the decisions of the supreme tribunal will be acquiesced in; and after disposing of the few questions which the constitution refers to it, all the minor questions belong properly to the State jurisdictions, and never were intended to be taken away in mass.

Efforts have been made to fix the precise sense of the constitution, when it vests jurisdiction in the general government, in "cases arising under the laws of the United States." To me, the question appears susceptible of a very simple solution; that all depends upon the identity of the case supposed; according to which idea, a case may be such in its very existence, or it may become such in its progress. An action may "live, move, and have

1824. Osborn v. U. S. Bank.

its being," in a law of the United States; such is that given for the violation of a patent-right, and four or five different actions given by this act of incorporation; particularly that against the President and Directors for over-issuing; in all of which cases the plaintiff must count upon the law itself as the ground of his action. And of the other description, would have been an action of trespass, in this case, had remedy been sought for an actual levy of the tax imposed. Such was the case of the former Bank against *Deveaux*, and many others that have occurred in this Court, in which the suit, in its form, was such as occur in ordinary cases, but in which the pleadings or evidence raised the question on the law or constitution of the United States. In this class of cases, the occurrence of a question makes the case, and transfers it, as provided for under the twenty-fifth section of the Judiciary Act, to the jurisdiction of the United States. And this appears to me to present the only sound and practical construction of the constitution on this subject; for no other cases does it regard as necessary to place under the control of the general government. It is only when the case exhibits one or the other of these characteristics, that it is acted upon by the constitution. Where no question is raised, there can be no contrariety of construction; and what else had the constitution to guard against? As to cases of the first description, *ex necessitate rei*, the Courts of the United States must be susceptible of original jurisdiction; and as to all other cases, I should hold them, also, susceptible of original jurisdiction, if it were prac-

1824.

Osborn v. U. S. Bank.

ticable, in the nature of things, to make out the definition of the case, so as to bring it under the constitution judicially, upon an original suit. But until the plaintiff can control the defendant in his pleadings, I see no practical mode of determining when the case does occur, otherwise than by permitting the cause to advance until the case for which the constitution provides shall actually arise. If it never occurs, there can be nothing to complain of; and such are the provisions of the twenty-fifth section. The cause might be transferred to the Circuit Court before an adjudication takes place; but I can perceive no earlier stage at which it can possibly be predicated of such a case, that it is one within the constitution; nor any possible necessity for transferring it then, or until the Court has acted upon it to the prejudice of the claims of the United States. It is not, therefore, because Congress may not vest an *original* jurisdiction, where they can constitutionally vest in the Circuit Courts *appellate* jurisdiction, that I object to this general grant of the right to sue; but, because that the peculiar nature of this jurisdiction is such, as to render it impossible to exercise it in a strictly original form, and because the principle of a possible occurrence of a question as a ground of jurisdiction, is transcending the bounds of the constitution, and placing it on a ground which will admit of an *enormous accession*, if not an *unlimited assumption*, of jurisdiction.

But, dismissing the question of possibility, which, I must think, would embrace every other case as well as those to which this Bank is a party, in what

1824.

Osborn v. U. S. Bank.

sense can it be predicated of this case, that it is one arising under a law of the United States? It cannot be denied, that jurisdiction of this suit in equity could not be entertained, unless the Court could have had jurisdiction of the action of trespass, which this injunction was intended to anticipate. And, in fact, there is no question, that the Bank here maintains, that the right to sue extends to common trespass, as well as to contracts, or any other cause of action. But suppose trespass in the common form instituted; the declaration is general, and the defendant pleads not guilty, and goes to trial. Where is the feature in such a cause that can give the Court jurisdiction? What question arises under a law of the United States? or what question that must not be decided exclusively upon the *lex loci*, upon State laws? Take also the case of a contract, and in what sense can it be correctly predicated of that, that in common with every other act of the Bank, it arises out of the law that incorporates it? May it not with equal propriety be asserted, that all the crimes and all the controversies of mankind, arise out of the fiat that called their progenitor into existence? It is not because man was created, that he commits a trespass, or incurs a debt; but because, being indued with certain faculties and propensities, he is led by an appropriate motive to the one action or the other. Sound philosophy attributes effects to their proximate causes. It is but pursuing the grade of creation from one step to another, to deduce the acts of this Bank from State law, or even divine law, with as much correctness as from the law of

its immediate creation. Its contracts arise under its own acts, and not under a law of the United States; so far from it, indeed, that their effect, their construction, their limitation, their concoction, are all the creatures of the respective State laws in which they originate. There is a satisfactory illustration of the distinction between contracts which draw their existence from statutes, and those which originate in the acts of man, afforded by this act of incorporation itself. It will be unnecessary to look beyond it. The action of debt before alluded to, given by the ninth clause of the seventh section, against the directors, to any one who will sue, is one of those factitious or statute contracts which exist in, and expire with, the statute that creates it. Not so with the ordinary contracts of the Bank; upon the expiration of the charter, they would be placed in the state of the credits of an intestate before administration; there is no one to sue for them; but the moral obligation would remain, and a Court of equity would enforce it against their debtors, at the suit of the individual stockholders. Nor would this be on the principle of contracts executed under power of attorney; for, the law applicable to principals would govern every question in such causes. All the acts of the corporation are executed *in their own* right, and not in *the right of another*. A personal existence, with all its incidents, is given to them, and it is in right of that existence that they are capable of acting, and do act.

Nor, indeed, in another point of view, is it strictly predicable of this Bank, that its acts arise

1824. Osborn v. U. S. Bank.

out of, because its existence is drawn from, a law of the United States. It is because it is *incorporated*, not because incorporated by a *law of the United States*, that it is made capable of exercising certain powers incidentally, and of being vested with others expressly. The same effects would follow, if incorporated by any other competent legislative power. The law of the United States creates the Bank, and the common law, or State law more properly, takes it up and makes it what it is. Who can deny, that in many points the incidents to such an institution may vary in different States, although its existence be derived from the general government? It is the case with the natural alien, when adopted into the national family. His rights, duties, powers, &c., receive always a shade from the *lex loci* of the State in which he fixes his domicil.

If this right to sue could be vested at all in the Bank, it is obvious that it must have been for one or more of three causes: 1. That a law of the United States incorporated it; 2. That a law of the United States vested in it the power to sue; or, 3. That the power to defend itself from trespasses as applicable to this case strictly, or to contract debts as applicable to the Georgia case, was conferred on it by a law of the United States expressly.

The first I have considered. On the second, no one would have the hardihood to contend, that such a grant has any efficacy, unless the suits come within the description of cases arising under a law of the United States, independently of the

grant of the right to sue; and it only remains to add a few more remarks on the third ground. 1824. Osborn v. U. S. Bank.

Of the power to repel trespasses, and to enter into contracts, as mere incidents to its creation, I trust I have shown, that neither comes within the description of a case arising under a law of the United States. But where will we find, in the law in question, any express grant of power relative to either? The contracts on which the Georgia case is founded, are declared on as common promissory notes, payable to bearer. Now, as mere incidents, I have no doubt of an action being sustainable in a State Court in both cases. But if an express grant is relied on, as bringing this, or the case of a contract, within the description of "a case arising under a law of the United States," then I look through the law in vain for any express grant, either to make the contract, or repel the trespass. It is true, the sweeping terms with which the incorporating section concludes, import, that "by that name it shall and may be lawful for the Bank to do and execute all and singular the acts, matters, and things, which to them it shall and may appertain to do." But this contains no grant of either, since the inquiry, at last, must be into the incidents of such an institution, and, as incidents, they needed not these words to sustain them; nor could those words give any more force to the right. So that, at last, we are referred to the mere fact of its corporate existence, for the basis of either of the actions, or either of the powers here insisted on, as bringing this cause within the constitutional definition. Having a le-

1824.

Osborn v. U. S. Bank.

gal existence as an incorporated banking institution, it has a right to security in its possessions, and to the performance of its contracts; but that right will be precisely the same, if incorporated by a State law, or even, as was held in the case of *Terrett v. Taylor*, if having a common law corporate existence. The common law, or the State law, is referred to by the law of the United States, as the source of these incidents, when it speaks of the acts which are appurtenant to it; and I know of no other law that can define them, or confer them as incidents. Suppose a naturalization act passed, which, after specifying the terms and conditions upon which an alien shall become a citizen, proceeds to declare, "that, as a citizen, he shall lawfully do and execute all and singular the acts, matters, and things, which to 'a citizen,' or 'to him as a citizen,' it shall and may appertain to do," would not these words be a mere nullity? His new existence, and the relations with the society into which he is introduced, that grow out of that connexion, give him the right to defend his property or his existence, (as in this case,) and to enter into and enforce those contracts which, as an alien, he would have been precluded from. He was no more a citizen, without an act of Congress, than this was a Bank. Finally, after the most attentive consideration of this cause, I cannot help thinking, that this idea of taking jurisdiction upon an hypothesis, or even of assuming original, unlimited jurisdiction, of all questions arising under a law of the United States, involves some striking inconsistencies. A Court may take cognizance of a ques-

tion in a cause, and enter a judgment upon it, and yet not have jurisdiction of the cause itself. Such are all questions of jurisdiction, of which every Court, however limited its jurisdiction, must have cognizance in every cause brought before it. So, also, I see not why, upon the same principle, a law expressly violating the constitution, may not be made the groundwork of a transfer of jurisdiction. Cases may arise, and would arise, under such a law; and if the simple existence, or possibility of such a case, is a sufficient ground of jurisdiction, and that ground sufficient to transfer the whole case to the federal judiciary, the least that can be said of it is, that it was not a case within the mischief intended to be obviated by the constitution. I shall say no more on this subject, but proceed to one which also acts forcibly on my judgment in forming my opinion in this cause.

I will not undertake to define the limits within which the discretion of the Legislature of the Union may range, in the adoption of measures for executing their constitutional powers. It is very possible, that in the choice of means as "proper and necessary" to carry their powers into effect, they may have assumed a latitude not foreseen at the adoption of the constitution. For example, in order to collect a stamp duty, they have exercised a power over the general law of contracts; in order to secure debts due the United States, they have controlled the State laws of estates of deceased persons and of insolvents' estates; in the distributions and the powers of individuals themselves, when insolvent, in the assignment of their

1824.

Osborn v. U. S. Bank.

own estates; in the exercise of various powers, they have taken jurisdiction over crimes which the State laws took cognizance of; and all this, being within the range of their discretion, is aloof from *judicial* control, while unaffectedly exercised for the purposes of the constitution. Nor, indeed, is there much to be alarmed at in it, while the same people who govern the States, can, where they will, control the Legislature of the United States.

Yet, certainly, there is one limit to this chain of implied powers, which must lie beyond the reach of legislative discretion. No one branch of the general government can new model the constitutional structure of the other.

Much stress was laid, in the argument, upon the necessity of giving co-ordinate extent to the several departments of a government; but it was altogether unnecessary to bring this consideration into the present case. As a ground of policy, this is not its proper place; and as a ground of construction, it must be needless, when applied to a constitution in which the judicial power so very far transcends both the others, in its acknowledged limits.

The principle is, that every government should possess the means of protecting itself; that is, of construing and enforcing its own laws. But this is not the half of the extent of the judicial power of the Union. Its most interesting province, is to enforce the equal administration of laws, and systems of laws, over which the legislative power can exercise no control. And thus the judicial power is distributed into the two

classes: 1. That which is defined by the circumstances of the case; and, 2. That which depends upon the circumstances of the person. On the first, I have endeavoured to show, that the end is adequately effected by the provisions of the 25th section of the Judiciary Act, and, practically, can be exercised in no other way. But with regard to the second class, the argument turns against the United States; and every reason that may be urged in favour of eking out the jurisdiction in the first class of cases, reacts forcibly to confine the jurisdiction strictly within its constitutional limits, as to the second class. When the alien, or the citizen of another State, or the grants of another State, are implicated, the State Courts open their tribunals to the judiciary of the United States, and recognise their power as co-ordinate. Their citizens, their territory, their laws, all are subjected to a power quite foreign to the States, and judicial power is literally poured out upon the Courts of the Union, without stint.

How interesting, then, is it to the States, that the number of those *persons* who claim the privilege of coming into the Courts of the United States should be strictly limited! *Cases*, since they arise out of laws, &c. of the United States, must be very limited in number; but *persons* may bring into the Courts of the United States any question and every question, and, if this law be correctly construed, for any, the very smallest possible amount.

But if the plain dictates of our senses be relied on, what state of facts have we exhibited here?

1824.

Osborn v. U. S. Bank.

Making a person, makes a case; and thus, a government which cannot exercise jurisdiction unless an alien or citizen of another State be a party, makes a party which is neither alien nor citizen, and then claims jurisdiction because it has made a case. If this be true, why not make every citizen a corporation sole, and thus bring them all into the Courts of the United States *quo minus?* Nay, it is still worse, for there is not only an evasion of the constitution implied in this doctrine, but a positive power to violate it. Suppose every individual of this corporation were citizens of Ohio, or, as applicable to the other case, were citizens of Georgia, the United States could not give any one of them, individually, the right to sue a citizen of the same State in the Courts of the United States; then, on what principle could that right be communicated to them in a body? But the question is equally unanswerable, if any single member of the corporation is of the same State with the defendant, as has been repeatedly adjudged.

One of the counsel who argued this cause in behalf of the Bank, has denominated it a bundle of faculties. This is very true; but those faculties are substituted for the organization of a natural person; and it is perfectly certain, that when it comes into this Court, it must be treated as a person. It is altogether inadmissible, to refine away the principles of jurisprudence, so as to consider it in any other light than that of a person. As such, it sues out a writ, declares, pleads, takes judgment, and levies an execution. If it is not a

person, it has no standing in this Court; it must, therefore, abandon this suit, or be subjected to personal disabilities. Gentlemen have a right to take what ground here they please, to sustain this action; but it is perfectly clear to me, that the act of Congress was intended to vest this right as a personal right, or not at all. Let any one look through this act, and notice the unrestricted latitude that has been assumed in vesting the right to sue both by and against this Bank, and he will see, that either there is no general right to sue given in the seventh section, now relied on, or that it is given under the general power granted to pass all laws necessary to carry the powers of the general government into execution. The proviso to the 17th section is a remarkable proof of this. It puts the limits of judicial power altogether out of view. If Congress, in legislating on this subject, did intend such a grant as is here contended for, it must be presumed that they did not advert to the consideration, that granting to an individual a right to sue, was enlarging the jurisdiction of the Court. It never can be supposed, that they meant to assume the power of adding to the number of persons who might constitutionally become suitors in the Courts of the United States. But every difficulty vanishes, when we limit the meaning of the language of the act, by a reference to the context. In fact, a general power to bring actions in the Courts of the United States, is so peculiarly and explicitly personal on the face of the constitution, that it is hard to perceive how Congress could have for a moment lost sight of the restric-

1824.

Osborn v. U. S. Bank.

tions imposed, in this respect, upon the judicial power.

Nor had the Bank any idea that this power was vested in it, upon the ground that every possible case in which it might be involved in litigation, came within the constitutional definition of cases arising under laws, &c. of the United States. In its averments, those on which it claims jurisdiction, it simply takes two grounds: 1. That it was incorporated by an act of Congress; 2. That the right to sue was given it by an act of Congress. But there is no averment, that the cause of action was a case arising under a law of the United States. It well knew, that it was a case emphatically arising out of an act of the State of Ohio, operating upon the domicil of the Bank, which, although purchased in right of an existence metaphysically given it by Congress, was acquired and held according to the laws of Ohio, acting upon its own territory. Technically, these averments cover only two grounds; they affirm, 1. That the Bank, being incorporated by Congress, had, therefore, a right to sue; 2. That being incorporated, and having the right to sue conferred upon it by an act of Congress, therefore, it could maintain this action. But yet neither, nor both of these, could give the right, unless in one of the cases defined in the constitution, which case is not the subject of an averment. I would not willingly place the case on the ground of mere technicality; and, therefore, only make the observation to show, that the ground assumed in argument, is an afterthought. I believe that, until this argument, the

ground now made was never thought of; and I am at a loss to conceive how it is possible to maintain the position, that all possible cases in which this Bank shall sue or be sued, come within the description now contended for. Take, for instance, a trespass or a fraud committed by the Bank, and suit brought by the injured party, in what sense could they be said to be cases arising under a law of the United States? Or, take the case of ejectment, suppose to recover part of the premises of the banking house in Philadelphia, and not a question raised in the suit, but what arises under the territorial laws of the country, and what circumstances characterize that as a case of the proper description to give this Court jurisdiction? If this cause of action arises under a statute, why is not the statute referred to, and the provision particularly relied on, if there is any other than what the averments specify?

Various instances have been cited and relied on, in which this right of suit in the Courts of the United States has been given to particular officers of the United States. But on these I would remark, that it is not logical to cite as proofs, the exercise of this right, in instances which may themselves be the subject of constitutional questions. It cannot be intended to surprise this Court into the recognition of the constitutionality of the laws so cited. But there is a stronger objection; no such instance is in point, until it be shown that Congress has authorized such officers to bring their private contracts and private controversies into the Courts of the United States. In all the

1824. Osborn v. U. S. Bank.

cases cited, the individual is acting distinctly as the organ of government; but let them take the character of a mere contractor, a factor, a broker, a common carrier, and then let laws authorizing them to sue in the Courts of the United States be passed, and I will acknowledge the cases to be in point; though I will still dispute the principle, that a repetition of error can convert an act into law or truth. The distinction is a clear one between all these cases and the Bank. The latter is a mere agent or attorney, in some instances; in others, and especially in the cases now before the Court, it is a private person, acting on its own account, not clothed with an official character at all. But the acts of public officers are the acts of government; and emphatically so, in suits by the Postmaster-General; the money to be recovered being the property of the United States, it may be considered that they are parties to the suit, just as those States are to the suits by or against their Attorney-General, where he is by law authorized to bring and defend suits in his own name officially. When the United States are parties, the grant of jurisdiction is general. But, there is express law also for every contract that the Postmaster enters into, or it will be in vain for him to bring his suit in his own name or otherwise. It would be in vain for him to rely simply on his being made Postmaster under an act of Congress; in which point alone, there would seem to exist any analogy between his case and that of the Bank.

As to the instance of the action given under the patent law, it has been before remarked, that so

entirely is its existence blended with an act of Congress, that to prosecute it, it is indispensable that the act should be set forth as the ground of action. I rather think it an unfortunate quotation, since it presents a happy illustration of what we are to understand by those cases arising under a law of Congress, which in their nature admit of an exercise of original jurisdiction. The plaintiff must recover, must count upon the act of Congress; the constitutional characteristic appears on the record before the defendant is called to answer; and the repeal of the statute before judgment, puts an end to his right altogether. Various such cases may be cited. But how the act of Congress is to be introduced into an action of trespass, ejectment, or slander, before the defendant is called to plead, I cannot imagine.

Upon the whole, I feel compelled to dissent from the Court, on the point of jurisdiction; and this renders it unnecessary for me to express my sentiments on the residue of the points in the cause.

Decree affirmed, except as to interest on the amount of the specie in the hands of the defendant, Sullivan.